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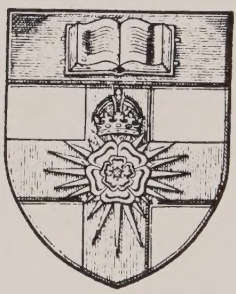

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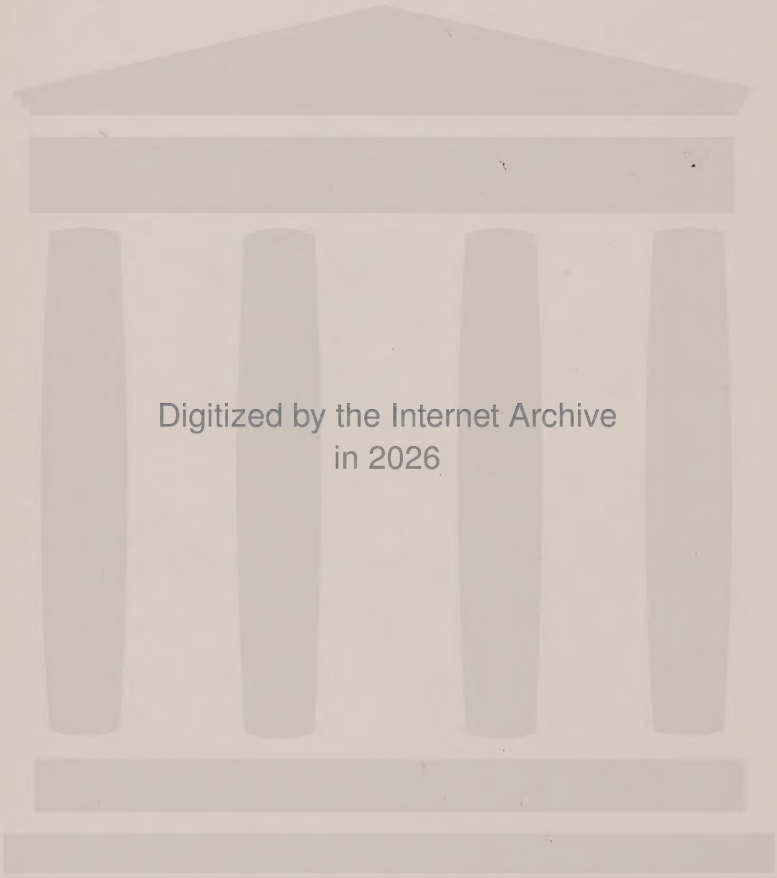
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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

XLIX VICTORIÆ.

[IN THE COURT OF APPEAL.]

1885
Oct. 28.

BURSILL *v.* TANNER.

Practice—Solicitor called as Witness, Professional Privilege of—Name of Client not Matter of Confidence—Parol Evidence, who Trustees of Settlement are, proveable by—Document, when Solicitor obliged to produce—Privilege that of the Client.

Judgment having been signed against a married woman in an action, an inquiry was directed before a master whether she was possessed of any separate estate. The solicitor to the trustees of her marriage settlement, being subpœnaed by the judgment creditor upon the inquiry as a witness, and to produce documents, stated that the deed of settlement was in his possession as solicitor to the trustees, but refused to state the names of the trustees or produce the deed on the ground of professional privilege:—

Held, that he must state the names of the trustees and produce the deed.

APPEAL from the order of the Queen's Bench Division (Mathew, Cave, and Wills, JJ.) affirming the order of Smith, J.

The facts were as follows:—

Judgment having been signed in an action against the defendant, a married woman, an inquiry was directed to be held before a master whether the defendant was possessed of separate estate.

The appellant, a solicitor, being called as a witness by the

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judgment creditor under a subpœna to give evidence on such inquiry, and produce documents, stated that there was a settlement executed upon the defendant's marriage, that he knew who the trustees of such settlement were, and that his firm acted as their solicitors, but he refused to state the names and addresses of the trustees, or to produce the settlement, or give any information as to its contents, on the ground of his privilege as a solicitor. An application was made to Smith, J., at chambers, against the appellant under Order XXXVII., rules 13–15, and the learned judge made an order overruling his objection to answer the questions put to him, which order the Divisional Court affirmed on appeal.

The appellant had made an affidavit which stated that his firm had prepared the marriage settlement, and that after its execution it had been handed to the firm as solicitors for the trustees of the settlement, and remained in their possession as solicitors for such trustees.

Mansel Jones, for the appellant. The appellant was not bound to state the names of the trustees of the settlement, for that would be giving parol evidence of the contents of a written document. It would be likewise disclosing matters communicated to him in his professional capacity, and therefore privileged.

[LINDLEY, L.J. Has it not been the rule ever since the case of *Parkhurst* v. *Lowten* (1) that a solicitor claiming privilege on behalf of his client must disclose the client's name.]

No question in strictness arises on this appeal with regard to the production of the deed of settlement, for the order only relates to the objection to answering questions, but the appellant is willing to do whatever the Court may think his duty in the matter. It is submitted that the appellant ought not to be obliged to produce the deed of settlement, which belongs to his clients, the trustees, and which he received from them and holds on their behalf as their solicitor, without their consent. If its production was required, its owners, the trustees, should have been subpœnaed to produce it. [He cited *Ex parte Campbell, In re Cathcart.* (2)]

Sills, and *Longstaffe*, for the judgment creditor. The names

(1) 2 Sw. 194. (2) Law Rep. 5 Ch. 703.

of the trustees are not part of the contents of a written document within the rule of evidence upon which the appellant relies. It is a matter of fact who are acting as such trustees. It is a general principle of law applicable to many cases that, when a person is in fact holding an office or exercising a function, it is not necessary, in order to prove his appointment, to prove or produce the instrument appointing him. The appellant probably knew, apart from the deed, who were in fact acting as trustees of the settlement. He may have known that they had received dividends and handed them over to the cestui que trust or otherwise acted in the trust. He does not say that his only knowledge on the subject is from the deed. There is no ground for saying that the trustees communicated their names to the solicitor as a matter of professional confidence. It is not everything that comes to the solicitor's knowledge in the course of his business with the client that is privileged. The principle on which *Ex parte Campbell, In re Cathcart* (1) was decided applies to this case. [They also cited on this point, *March* v. *Keith* (2), and *Doe* v. *Marquis of Hertford.* (3)] Secondly, the appellant is not entitled to withhold the deed unless his clients would be entitled to do so. Two things are necessary to constitute the privilege for this purpose. The document must have come into the solicitor's possession confidentially, and the client must be entitled to withhold it. The rule on the subject is thus laid down in Taylor on Evidence, 7th ed. p. 411, § 458: "If the witness be a solicitor, though he will be permitted, he will certainly not be forced, except in some cases for the purposes of identification, to produce any instrument which he holds confidentially for his client, and which his client has a right to keep back." If this deed were in the trustees' possession, and they were subpœnaed to produce it, what right would they have to refuse to produce it? The cestui que trust would have a right to call for it, and consequently so has a judgment creditor of the cestui que trust. [They cited on this point *Doe* v. *Langdon* (4); *Volant* v. *Soyer.* (5)]

(1) Law Rep. 5 Ch. 703.
(2) 30 L. J. (Ch.) 127.
(3) 19 L. J. (Q.B.) 527.
(4) 12 Q. B. 711.
(5) 13 C. B. 231.

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Mansell Jones, in reply.

LORD ESHER, M.R. I have no doubt that the solicitor in this case acted from high motives, and that he only wishes to have the law on the subject authoritatively stated by the Court for his guidance. Putting aside technicalities, there are two substantial points, the first being whether, under the circumstances, he was bound, when asked, to say who the trustees of the settlement were, or was entitled to say that, although he knew, he would not disclose their names. Two grounds were alleged as entitling him to withhold their names. The first ground was that by stating them he would be stating the contents of a written document, viz., the marriage settlement by which they were appointed. The second ground was that, as he was the solicitor who acted for the trustees and drew the deed of settlement, the disclosure of the names of the trustees by him would be a breach of professional confidence. I do not think that either of these grounds is tenable. Stating the names of these trustees would not, in my opinion, be stating a material part of the contents of a written instrument within the meaning of the rule of law on the subject. No doubt the trustees are named in the deed, but it is a fact dehors the deed who they are. With regard to the question whether the solicitor could refuse to disclose the names of the trustees on the ground that they were communicated to him in confidence, the matter stands thus: he is in this predicament. He must allege that the communication was privileged because the trustees, his clients, made it to him in confidence, and then he cannot refuse to say who these clients are. I agree with the opinion expressed by James, L.J., in *Ex parte Campbell, In re Cathcart* (1), that the fact who the clients were was not the subject of a professional confidence. The client does not consult the solicitor with a view to obtaining his professional advice as to whether he shall be his solicitor or not.

The second question is whether the solicitor was bound to produce the deed of settlement, which he admitted was in his possession as solicitor to the trustees. The rule as to this question seems to be laid down correctly in the passage that has been

(1) Law Rep. 5 Ch. 703.

cited to us from Taylor on Evidence. Though there may be no case that exactly decides the point, yet many cases seem to assume that there can be no such privilege, unless the client could refuse to produce the deed. This does not seem to me to be a title-deed or a deed which the clients themselves could have refused to produce. That being so, I do not think their solicitor could refuse to produce it. Therefore I think, being subpœnaed to produce it, or having it in his possession in court, he would be bound to produce it. On these grounds I think the appeal must be dismissed.

COTTON, L.J. Two questions arise upon this appeal. The first is whether the solicitor to the trustees, who were not parties to the litigation, is obliged to state the names of the trustees. The second is whether he is bound to produce the deed of settlement. These questions are of some importance, having regard to the number of actions brought against married women to which their trustees are not made parties. I see no reason why the solicitor should not be obliged to state the names of the trustees. It is not everything that solicitors learn in the course of their dealings with clients that is privileged from disclosure. This matter was much discussed in the case of *Lyell* v. *Kennedy*. (1) The privilege extends only to confidential communications. It is not necessary for me to go through all the cases that have been decided on the question what constitutes a confidential communication. In my opinion, the names of the trustees did not constitute such a communication. The mere fact who the trustees are cannot be said to be a matter communicated to the solicitor confidentially for the purpose of obtaining his professional advice, or at any rate, it is highly improbable that it should be so. There is also another ground for compelling the disclosure of their names. The solicitor claims this privilege as that of his clients. He must then state the names of the persons for whom he claims the privilege. On both these grounds I think he was bound to answer the question and to give the names and addresses of the trustees. This case seems to me to be really covered in principle by the case of *Ex parte Campbell*,

(1) 23 Ch. D. 387; 9 App. Cas. 81.

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In re Cathcart. (1) Then, with regard to the production of the deed of settlement, in my opinion the solicitor cannot refuse to produce it on the ground taken. The trustees would be bound to produce it if the cestui que trust called for production of it in evidence, and they seem to me to be equally bound to produce it if called upon to do so by the judgment creditor of the cestui que trust.

LINDLEY, L.J. I am of the same opinion. As regards the refusal of the solicitor to state the names of the trustees, I think that question is disposed of by the decision of Lord Eldon in the case of *Parkhurst* v. *Lowten.* (2) He there says that "the witness demurring on the ground that his answer would violate the confidence reposed in him as attorney must name the party to whom he was attorney." The case of *Ex parte Campbell, In re Cathcart* (1), is a modern illustration of the same principle. With regard to the production of the settlement, it seems to me that the real question is whether the clients of the solicitor had a right to withhold it. The clients are the trustees of the deed, and the person who calls for its production is a judgment creditor who seeks to be satisfied out of the separate estate of the cestui que trust, a married woman. It seems to me that the judgment creditor had a right to its production as against the trustees, and that the solicitor was therefore bound to produce it. If it were otherwise, judgments in favour of creditors against married women would, in many cases, be useless.

Appeal dismissed.

Solicitors for appellant: *Freshfields & Williams.*
Solicitors for judgment creditor: *Dod & Longstaffe.*

(1) Law Rep. 5 Ch. 703. (2) 2 Sw. 194.

E. L.

[IN THE COURT OF APPEAL.]

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THE QUEEN ON THE PROSECUTION OF THE ASSESSMENT COMMITTEE OF THE GUARDIANS OF THE POOR OF THE FALMOUTH UNION *v.* THE REV. BRIAN CHRISTOPHERSON.

Poor-rate—Parson in respect of what rateable—Rector's Rate—43 Eliz. c. 2—3 & 4 Vict. c. 89.

Under the provisions of a local Act the rector of a parish received annually the proceeds of a rate called the rector's rate made upon the owners of houses, shops, warehouses, cellars, and outhouses :—

Held, that the rector was not rateable to the poor-rate in respect of the amount so received the same not being in lieu of tithes.

APPEAL from the judgment of the Queen's Bench Division upon a case stated from quarter sessions, of which the facts were in substance as follows :—

The Rev. Brian Christopherson had appealed to the sessions against two poor-rates made upon him in Falmouth town and Falmouth parish respectively, being two of the parishes in the Falmouth Union, in respect of a certain rate called the Parson's or Rector's Rate, payable to him as the rector of Falmouth.

The parish of Falmouth, which comprises within it the town of Falmouth, originally formed part of the parish of St. Gluvias, but was separated therefrom and created a distinct parish under two Acts of Parliament of the 16 Car. 2 and 22 & 23 Car. 2. Provision was made in the said Act of 16 Car. 2 for the collation and admission from time to time to the said church of Falmouth of one fit and sufficient person to be called the parson or rector of the parish church of Falmouth.

It was also provided by the said Act that the said parson and his successors should have and receive all tithes, &c., within the limits of the parish of Falmouth which the vicar of St. Gluvias should or might have received in right of his vicarage if the Act had not been passed; and that the mayor and aldermen of Falmouth for the time being, or any three of them, should be thereby empowered from time to time equally to rate and assess all and every the houses, shops, warehouses, cellars, and out-

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houses, with the appurtenances then being, or which thereafter at any time should be built in the town and precincts of Falmouth according to the true yearly rent or value of the said houses, shops, warehouses, cellars, and outhouses, with the appurtenances, after the rate of sixteen pence in the pound, to be paid by the several and respective owners of the same at the four most usual feasts in the year by even and equal portions to the parson of Falmouth and his successors for ever.

A rate was made by the mayor and two aldermen of Falmouth in accordance with the above-mentioned provision on the 31st of October, 1882.

In the two poor-rates in question the Rev. Brian Christopherson was rated in respect of the rector's rate so made.

The town of Falmouth is part of the ecclesiastical parish of Falmouth as created by the before-mentioned Acts but separately maintains its own poor.

The rector's tithes in the parish of Falmouth were in the year 1841 duly commuted under the Act for the Commutation of Tithes in England and Wales for the sum of 140*l.* When houses, shops, warehouses, cellars, and outhouses, with the appurtenances, have been built on land liable to tithe, tithe has not been collected in respect thereof. The tithes had been separately rated to the relief of the poor in the parish of Falmouth.

The sessions dismissed the appeal subject to a case.

The question for the opinion of the Court was whether the rector was liable to be rated to the parochial rates of Falmouth Town or Falmouth parish in respect of the said parson's or rector's rate received by him in the said town and parish of Falmouth. The Queen's Bench Division held that the rector was not so liable and accordingly quashed the order of sessions and the rates appealed against. Against this judgment the assessment committee appealed.

Oct. 28. *Sir F. Herschell, Q.C.*, and *Wilfred Baugh Allen*, for the appellants, the assessment committee. The rector was rateable in respect of the rector's rate. The question turns on 43 Eliz. c. 2. The subsequent statute, 3 & 4 Vict. c. 89, which gave legal sanction to the practice of exempting personal property from poor-

rate, expressly leaves untouched any liability of the parson or vicar under 43 Eliz. c. 2. That Act provides for the raising of the moneys necessary for the relief of the poor "by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods . . . . according to the ability of the same parish." It is to be observed that the parson is not made rateable as an occupier of a hereditament but under the first head as an inhabitant. His liability, whatever it might be under the statute of Elizabeth, being reserved by 3 & 4 Vict. c. 89, he remains liable in respect of his personal ability to contribute as rector of the parish, that is to say, in respect of any sums received by him forming part of the annual value of his rectory. There is nothing in the words of the statute of Elizabeth to confine the liability of the parson or vicar to tenements or hereditaments occupied by him. The parson is clearly rateable in respect of tithes and, inasmuch as tithes in the hands of the parson are not mentioned among the matters the occupation of which is rateable in the latter part of the section, it is clear that the parson's rateability in respect of tithes must have been under the words "inhabitant, parson, vicar, and other." It has always been held that the parson was liable to be rated in respect of any composition or payment in lieu of tithes, and it is difficult to see how that should be so on any other footing than one which would equally include this rector's rate. It is true that land when built upon ceases to be titheable because there are no fructus industriales, and this rate therefore is leviable on property which but for the Act would not have been subject to any payment in the nature of tithes: still the rate under the Act may be said to be in lieu of tithes in the sense that it is a provision for the rector by way of compensation for the tithes which he would have received if the land had not been built upon. There is nothing in the statute of Elizabeth to warrant any distinction, so far as the rector is concerned, between any emolument of his benefice which is a tenement, and any emolument which is not: *Rex* v. *Toms* (1); *Rann* v. *Pickin.* (2)

[LORD ESHER, M.R. A payment cannot properly be said to be

(1) Doug. 401. (2) Caldec. 196.

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in lieu of tithes within the meaning of the decisions except where the statute creating it takes away tithes.]

[They cited Viner's Abridgment, title "Poor," F. 427; *Lowndes* v. *Horne* (1); *Powell* v. *Bull* (2).]

The case of *R.* v. *Great Hambleton* (3), which the Queen's Bench Division regarded as an authority against the rateability of the rector, is not really so, for it seems that the real ground of the decision there was that the annuity which the vicar received in lieu of tithes had been fixed on the footing that the poor-rate was already deducted, and so if the annuity had been rateable he would have been rated twice over.

[LORD ESHER, M.R. The appellants seek to go back to the words of the statute, and to contend that the rector is to be rated in respect of his general ability. All the decisions ever since the statute have gone on the footing that his ability from certain sources only must be looked to.]

Charles, Q.C., and *Fraser MacLeod*, for the respondent, the rector. It is clear from the decisions that before the statute 3 & 4 Vict. c. 89, the rector would not have been liable in respect of such a rate as this. The rector of a parish has never been assessed in respect of his general ability as an inhabitant, but only as an occupier of tithes. The parson or vicar is expressly mentioned in 43 Eliz. c. 2, probably to prevent any suggestion that ecclesiastical personages were exempt when not expressly mentioned by reason of the provisions of Magna Charta. In 39 Eliz. c. 3, nothing is said about "parson or vicar." There is no trace from the time of Elizabeth downwards of the parson's being rated otherwise than as occupier of glebe or tithes: Dalton's Justice, c. 73, p. 254, ed. of 1727; *Rex* v. *Skingle* (4); *Rex* v. *Lambeth* (5); *Rex* v. *Wilson*. (6) All the cases shew that it was as an occupier of tithes that the parson was rated in respect thereof. The words of the latter part of the statute of Elizabeth are susceptible of the construction that they include tithes in the hands of the parson. They may be read thus, "tithes, impropriate, or propriations of, tithes." In all the cases in which

(1) 2 Wm. Bl. 1252.
(2) Comyns' Rep. 265.
(3) 1 A. & E. 145.
(4) 1 Str. 100.
(5) 1 Str. 525.
(6) 5 N. & M. 119.

payments made to the rector have been held rateable they have been payments strictly in lieu of tithes—that is to say, where but for the payment tithe would have been payable. Here that is not the case. The deductions which would be allowable from the gross amount of such a payment as this would be quite different from the deductions which would be allowable in the case of a sum payable strictly speaking in lieu of tithes. If the question was merely as to the general ability of the rector to pay rates as affected by such a payment as the rector's rate, many matters ought in justice to be taken into consideration, such as curates' salaries. But these are not the subject of deduction under the Acts relating to parochial assessments, and the rate has not been made here on the footing that it is a question of general ability: *Reg.* v. *Sherford* (1); 6 & 7 Wm. 4, c. 71.

Sir F. Herschell, Q.C., in reply.

Cur. adv. vult.

Nov. 16. LORD ESHER, M.R. In this case the question is whether the rector of Falmouth is liable to be rated to the poor-rate in respect of certain payments made to him under a local Act of Parliament. To decide this question we have to consider the true construction of the statute 43 of Eliz. c. 2. We cannot, however, in my opinion, be asked to construe this statute as if it was being construed now for the first time. We must take into account the interpretation put upon it in a series of former decisions. I must confess, however, that if I had to construe it for the first time I should feel obliged to construe it as it appears to have been construed since the time of the enactment itself. The Act uses very large words, but directly one comes to consider the working of the statute in practice it seems to me inevitable that those words should receive some limitation. The statute deals with the taxation of parishes according to the ability of the same, and, when the inhabitants in each parish are to be rated according to the ability of the parish, it seems clear that it is not admissible to look outside the parish and consider the ability of the inhabitants elsewhere. If it were permissible to look to the general ability of the inhabitants by reason of income arising in

(1) Law Rep. 2 Q. B. 503.

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any other part of England, or it may be of the world, it seems to me that it would be no longer dealing with the ability of the parish, but would be dealing with the general ability of the inhabitant as a man of means. Secondly, there would be this difficulty, viz. that the overseers could not in the nature of things have any means of obtaining knowledge as to such general ability of the person to be rated derived from sources in other parts of the country. And thirdly, if the inhabitant were also an inhabitant of other parishes, as might be the case, and, if he were rated in each parish according to his general ability, he would be rated several times over in respect of the same resources. It seems to me therefore obvious that in considering the ability of the parish, as required by the statute, which must involve the ability of each inhabitant, the overseers must consider only the ability of the person rateable as inhabitant of the parish—that is, his ability arising from means accruing to him in and through the parish. The next question which arises is in respect of what sort of property within the parish was the person to be rated rateable? Here again, if the overseers were bound to consider all sums of money which every inhabitant received from any source within the parish, they would be in great difficulty, because they would have no sufficient means of ascertaining what such sums of money might be. How, for instance, could they tell what profits a tradesman in the parish annually made? At the time when the statute of Elizabeth passed there would be no inquisitorial powers for finding out these matters, no means of requiring returns of annual profits. It seems to me, therefore, that from the very nature of the thing, and looking to the particular sorts of property expressly mentioned in the statute, the property that was to be taxable must be property that might be easily known to the overseers who had to determine the ability of the person arising from such property in the parish. Lord Kenyon, in the case of *R.* v. *Carlyon* (1), no doubt objected to the use of the term "*visible* property," and it may be that in one sense he was right in saying that there are rateable matters which are not properly speaking visible. It seems to me, however, that, when one looks at the terms of the statute, and considers that there were no

(1) 3 T. R. 385.

means of enforcing returns by the persons to be taxed, one is necessarily driven to the conclusion that the taxation must have been intended to be confined to ability arising from property of a tangible nature, or such as was easily cognisable by the overseers. The result in practice has been that the provisions of the statute have been generally treated as applicable to tenements and hereditaments within the parish, and the rate has been made upon the annual value of such tenements and hereditaments. Then with regard to tithes; tithes in the hands of the parson are not mentioned in the Act; only tithes impropriate, or propriations of tithes, are mentioned; but it is obvious that in old days, when tithes were received in kind, they were matters that could be easily seen and estimated by the overseers. Then, when tithes came to be commuted, either by custom or statute, and the parson received instead of tithes an annual money payment, it was impossible, upon the assumption that the tithes were rateable under the Act of Elizabeth, to hold that the liability to the rate could be escaped by the commutation of the tithe into money. There might be more difficulty in estimating the amount, but it was reasonable to hold that, the tithes having been rateable, the money payment in lieu of them should be rateable also. It was therefore held that the parson was rateable in respect of money payments made in lieu of tithes, unless the Act under which they were made provided to the contrary. If therefore it could be said that the money payment here was a money payment in lieu of tithes, I should say that according to all the authorities the rector would be rateable in respect of it; but, if it is a money payment not in lieu of tithes, and there is nothing in the Act to say that it shall be rateable, then to say that it should be rateable would be, in my opinion, going beyond any construction of the Act of Elizabeth that has ever been adopted. It is not a tenement or hereditament, nor is it property of that visible or tangible sort which I have referred to, nor can it, in my opinion, be said to be made in lieu of tithes. It is a payment to be made in respect of houses, shops, and other buildings; but, to be a payment in lieu of tithes, it must be a payment in respect of something in respect of which, but for the Act, tithes would have been payable. When a house is built on land it ceases to be titheable

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property, because no tithe can be payable in respect of a house. Now it seems to me that according to the decisions a parson was only rateable as such in respect of tithes or money payments in lieu of tithes strictly speaking, and therefore that the parson is not rateable in respect of this payment. In the case of *R.* v. *Carlyon* (1), Lord Kenyon is reported to have said that the parson would be rateable in respect of oblations and other offerings which constitute the rectorial or vicarial dues. This dictum was not necessary to the actual decision. If Lord Kenyon was right in that respect, it seems to me that either these matters are exceptions to the general rule, or it must be because such offerings being originally made in kind came within the same considerations as applied to tithes, as being matters easily cognisable by the overseers. For these reasons I think that the decision of the Court below was correct, and must be affirmed.

COTTON, L.J. We have to say what is the true construction of the Act of Elizabeth as applied to the present case, taking into account also the provisions of 3 & 4 Vict. c. 89. Under the Act of Elizabeth a person might be rateable under two heads, either as inhabitant, parson, vicar, or other, or as occupier of certain specified hereditaments, and the sum of money to be raised was to be raised in each parish according to the ability of the same, that is of the parish. That provision appears to me to involve that the persons rated must be rated according to their respective means arising in the parish, because it would be an extraordinary result if, the inhabitants having to be rated according to the ability of the parish in each parish, they were to be rated in each parish according to their ability both in that parish and elsewhere. We are relieved, however, of any difficulty on that score, because, as it appears to me, we are not to construe this statute as if it were being construed for the first time, but we must look at it by the light of many former decisions, to depart from which, at the present day, would, in my opinion, be wrong. The parson is especially mentioned among the inhabitants as subject to the rate, probably to prevent any suggestion that the clergy were exempt. And with regard to the question for what

(1) 3 T. R. 385.

he is rateable, it is expressly laid down by Littledale, J., in *R.* v. *Boldero* (1) that the statute of Elizabeth makes the parson rateable as such in respect of profit which he receives from the parish as parson. In respect of glebe in his occupation he would of course be rateable as an occupier as any other occupier is rateable in respect of land occupied by him. With respect to his rateability as inhabitant the question is whether, looking to the nature of the case and the decisions, the general words of the statute must not receive some limitation with regard to the profits for which the parson is rateable. Before dealing, however, with that question, I would refer to the provisions of 3 & 4 Vict. c. 89. That Act provides that, "it shall not be lawful for the overseers of any parish to tax any inhabitant thereof or such inhabitant in respect of his ability derived from the profits of stock-in-trade or any other property for or towards the relief of the poor: provided always, that nothing in this Act contained shall in any wise affect the liability of any parson or vicar or of any occupier of lands," &c.

One does not quite see how the Act could have affected occupiers, but at any rate it leaves the liability of the parson or vicar precisely as it was before the passing of the Act under the statute of Elizabeth. It does, however, I think, throw some light on the decisions with regard to the statute of Elizabeth, for by particularly specifying stock-in-trade as the subject of exemption it seems to shew what was the sort of property in respect of which under the statute the inhabitants were made rateable. Stock-in-trade appears to be specially referred to as being the most important property (other than lands or hereditaments in respect of which a person was rated as occupier) which was usually made the subject of the rate as being property of a visible or tangible kind easily cognisable by the overseers as a proof of the ratepayer's ability. This seems to me to shew that the property in respect of which inhabitants were rateable as such under the statute was property of a tangible kind. Now parsons are certainly rateable in respect of tithes but not as occupiers of the tithes, for the only mention of tithes in the part of the section that relates to occupiers is of impropriate tithes or propriations of tithes. It seems to me

(1) 4 B. & C. 467.

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that they were rated in respect of tithes as being ostensible tangible means of support possessed by the parson, for at that time they were taken in kind. This view with regard to the kind of property rateable under the part of the section relating to inhabitants accords with the part of the section relating to occupiers, the matters there specified, such as lands, houses, &c., being of such a nature as tends to shew that the means regarded in rating were matters tangible that could be seen and estimated by the overseers. It is easy to see how, when compositions were paid in lieu of tithes, or when a tithe rent was created in lieu of tithes in kind under some Act of Parliament, such compositions or rents were held to be rateable. When the creation of the payment involved the cessation of tithe, and so the payment was really a substitute for the tithe, upon an equitable construction of the statute it seemed reasonable to hold that the tithes having been rateable the substituted payment should be rated. In the case decided by Lord Kenyon, *Rex* v. *Carlyon* (1), the parson was entitled to every tenth fish, and he was held rateable in respect of the fish so received. That case resembled that of tithes, for the fish were visible tangible matters which the overseers could estimate.

I cannot find any case in which a parson has been rated in respect of an annual payment such as this unless made in lieu of tithes, that is to say, unless when the payment is created tithes are abolished. Lord Kenyon does, it is true, in *R.* v. *Carlyon* (1) refer to oblations and other offerings as matters in respect of which a parson might be rateable, but I can find no case where a parson has been held so rateable. But if he be so, it must be on the same principle as that on which he was rateable in respect of tithes, viz., that these were matters visible or tangible by the overseers. In *Rex* v. *Great Hambleton* (2), in which a payment made to the parson was held not rateable, stress was laid on the fact that the tithes were not extinguished: and I think this is important as shewing that, in the cases where payments to the parson were held rateable, the ground was that the payment was a substitute for the tithes which were extinguished. For these reasons I agree in thinking that the judgment below should be affirmed.

(1) 3 T. R. 385. (2) 1 A. & E. 145.

LINDLEY, L.J. I am of the same opinion. There are two portions of the statute of Elizabeth with regard to rating, the first being that which renders inhabitants liable, the second that which renders liable occupiers of certain specified matters.

The rate is not laid in this case on tithes or any matter expressly specified, or which is capable of occupation under that part of the statute which renders occupiers liable to be rated.

It is therefore obvious that the rector, if rateable in respect of this payment, must be so rateable under the former part of the Act relating to inhabitants. Accordingly it is argued that he is so rateable under the words "parson, vicar, or other." Then we have to see in respect of what a parson is rateable under that portion of the statute. With regard to that I have experienced some difficulty in ascertaining what the law has been held to be. Dalton's Justice, p. 254, ed. of 1727, misquotes the statute. He says, "every clergyman is to be rated for his glebe and tithes according to their yearly value so long as they are in his own occupation, because the statute charges every occupier of tithes," &c. There is undoubtedly some confusion here, because the only occupiers of tithes mentioned in the statute are the occupiers of tithes impropriate or propriations of tithes. So far as I can make out, after looking into the authorities, the parson was held rateable because he was expressly mentioned among the inhabitants, and he was held so rateable in respect of tithes, because they were property which, in the nature of things, was visible or tangible by the overseers. Whether there is any foundation for Blackstone's theory, viz., that parsons were rateable because they were expected to give a certain portion of the tithes to the poor, I cannot undertake to say, not having had the means of investigating that point; but it seems to me that they were held to be rateable in respect of tithes, because tithes formed the visible means of the parson which the overseers could see and estimate. I cannot find that the parson was ever rated as such in respect of anything but tithes or payments substituted for them, and perhaps, if Lord Kenyon is correct, for oblations and other such offerings. It is impossible to say that the payment in the present case is made in lieu of tithes. In a loose sense it

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may be said to be so made, viz., in the sense that, the tithes not being sufficient for the support of the rector, an additional source of income is provided by the statute. But in no accurate sense can the rector's rate be said to be in lieu of tithes.

It seems to me, therefore, that, inasmuch as this payment is not within the second part of the statute relating to the rating of occupiers, and is not tithes or a payment in lieu of tithes, or an oblation or offering in the nature of such, it is not rateable within the Act of Elizabeth as it appears to have been construed ever since its enactment.

I think that we should be putting an entirely new construction on the statute if we held these rates good. For these reasons I also am of opinion that the judgment of the Court below should be affirmed.

Judgment affirmed.

Solicitors for appellants: *Bolton, Robbins, Busk, & Co., for Glenn & Nalder.*

Solicitors for respondent: *Gregorys & Co., for Appleby Jenkins.*

E. L.

Nov. 17.

LEA, APPELLANT; THE ABERGAVENNY IMPROVEMENT COMMISSIONERS, RESPONDENTS.

Water Rate, Proceedings for Recovery of—Dispute as to Annual Value of Premises—Jurisdiction of Justices on Proceedings to enforce Rate—Waterworks Clauses Act, 1847 (10 *Vict. c.* 17), *s.* 68.

Upon the hearing before justices of a summons to enforce payment of a water rate made under a local Act incorporating the Waterworks Clauses Act, 1847, the justices have power, under s. 68 of that Act, to determine a dispute as to the annual value of the premises rated. It is not necessary to their jurisdiction before making an order for payment of the rate upon such summons that the dispute should have been previously determined in a separate proceeding before justices.

New River Company v. *Mather* (Law Rep. 10 C. P. 442) distinguished.

CASE stated by justices under the Summary Jurisdiction Act.

The facts were in substance as follows:—

The respondents and the appellant appeared before the petty

sessional court of summary jurisdiction for the division of Abergavenny, in the county of Monmouth, upon the hearing of a summons by which the appellant was summoned to appear before such court to answer to the claim of the respondents, particulars of which were annexed to the summons.

In the particulars were specified the charges for two quarters' water supply to a house in the appellant's occupation in Abergavenny, the total amount claimed being 11*l.* 2*s.*

These charges were made by the respondents under their local Act, which empowered them to supply water and make charges for such supply upon a certain scale based upon the annual value of the premises supplied. The local Act incorporated the Waterworks Clauses Act, 1847, except the clauses with respect to the amount of profit to be received by the undertakers. The respondents had based their charges upon the net annual value upon which the premises had been assessed to the poor rate during the period of supply, as shewn by the valuation list. The appellant had not paid the amounts claimed, nor any part thereof, and previous to the issue of the summons he had disputed the correctness of the annual value upon which the amounts charged were based. The appellant contended that, as there was a bonâ fide dispute between himself and the respondents as to the annual value of the said premises, the justices had no jurisdiction to adjudicate on the summons, and that, before the respondents could recover the water rate in question, they must obtain a decision of justices on the dispute as to value, under s. 68 of the Waterworks Clauses Act, 1847, and he therefore, upon the justices overruling his objection, refused to tender any evidence upon the question of value.

The respondents contended that, as the bench consisted of more than two justices, and had all the parties before it, it could, if necessary, fix the value.

The justices were of opinion that they could determine the dispute with regard to the value, and assess such value on the hearing of the summons, and, having as evidence before them the union valuation list for the time being in force during the period of supply of the water, they assessed the annual value according to such list, and made an order for the payment of the charges

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upon the appellant. The question was whether this decision was correct in law. (1)

Ram, for the appellant. Where there is a bonâ fide dispute as to the annual value upon which the water rate is to be assessed, the justices cannot make an order for payment until that dispute has been settled upon a separate proceeding before two justices, under s. 68 of the Waterworks Clauses Act, 1847. That section clearly contemplates a distinct and separate proceeding. There

(1) By the 68th section of the Waterworks Clauses Act, 1847 (10 Vict. c. 17), it is provided that the water rates, except as hereinafter and in the special Act mentioned, shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and, if any dispute arise as to such value, the same shall be determined by two justices.

By s. 74 of the same Act, it is provided that, if any person supplied with water neglect to pay the water rate, the undertakers may recover the rate due from such person if less than 20*l.* in the same manner as any damages, for the recovery of which no special provision is made, are recoverable by this or the special Act.

By the 85th section of the same Act it is provided that, if the waterworks be in England or Ireland, the clauses of the Railways Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, shall be incorporated with this and the special Act, and such clauses shall apply to the waterworks and to the undertakers respectively, and shall be construed as if the word "undertakers" had been inserted therein instead of the word "company."

The 140th section of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), provides with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matters referred to justices, that in all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount, or enforcing the payment thereof, is not provided for, such amount in case of dispute shall be ascertained and determined by two justices.

By s. 142 of the same Act it is provided that where in this or the special Act any question of compensation, expenses, charges, or damages, or other matter is referred to the determination of any one justice or more, it shall be lawful for any justice, upon the application of either party, to summon the other party to appear before one justice or before two justices, as the case may require, at a time and place to be named in such summons; and upon the appearance of such parties, or in the absence of any of them, upon proof of due service of the summons, it shall be lawful for such one justice or such two justices, as the case may be, to hear and determine such question.

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was no jurisdiction to go into the question upon the mere summons for payment of the rate. The appellant was not summoned before the justices to settle the bonâ fide dispute as to annual value, but to pay the rate on the assumption that the value was not in dispute, and he was not bound to have his witnesses as to value in attendance, or to go into that question: *New River Co.* v. *Mather*. (1)

R. Cunningham Glen, for the respondents. The case of *New River Co.* v. *Mather* (1) is not in point, for there the company proceeded for recovery of the water rate in the county court and not before justices. There is no reason why separate proceedings before justices should be necessary, or why the justices should not determine the dispute as to value upon the summons to enforce payment of the rate. The appellant could not be taken by surprise, for he knew that there was a dispute as to annual value and that was really the ground of his refusal to pay. If either party were taken by surprise or were unprepared to go into the question of value, the justices would grant an adjournment, as a matter of course, if applied to. There is no foundation in the words of the section for the suggestion that the determination of the dispute under s. 68 of the Waterworks Clauses Act must necessarily be upon a separate proceeding for that purpose only. Sect. 142 of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), provides for the procedure, when any question of compensation, &c., or other matter is to be determined by justices under the special Act. Sect. 68 of the Waterworks Clauses Act says nothing about procedure: it merely gives the justices power to determine any dispute as to value which they might not otherwise have had jurisdiction to determine. [He cited *West* v. *Downman* (2) and *Haywood* v. *East London Waterworks Co.* (3)]

Ram, in reply.

POLLOCK, B. The objection which is raised is that the magistrates had no jurisdiction to make this order against the appellant, upon a summons calling on him to answer a claim made by the respondents for the charges for water supply. The

(1) Law Rep. 10 C. P. 442.
(2) 14 Ch. D. 112.
(3) 28 Ch. D. 138.

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objection is this: it is said that, there being a dispute between the commissioners and the appellant with regard to the annual value of the premises, and that dispute not having been determined by justices in a separate proceeding, a condition precedent to the jurisdiction of the magistrates had not been fulfilled. The legislation on the matter is in rather a confused state, but the conclusion to which I come is this. I think it is perfectly open to any consumer of water to apply to the justices to have a dispute as to the annual value of the house determined by them upon a separate inquiry. The question here, however, is whether it is necessary that the annual value should have been determined on a separate and independent inquiry where, as here, the justices are sitting to hear a summons for the payment of water rate, and it appears that there is a dispute as to the value of the premises.

It seems to me that the words of the 68th section of the Waterworks Clauses Act are satisfied by having the dispute determined upon the hearing of the summons for payment by the justices who determine the summons. There seems to be no reason why the justices who hear that summons should not determine the dispute as to value, except the suggestion that the general tenor of the enactment seems to contemplate a separate inquiry. I think this is true in the sense that there may be a separate inquiry under s. 68, but I do not see why that should necessarily preclude the settlement of the dispute at the same inquiry as that held on the summons for payment.

The case of *New River Co.* v. *Mather* (1) was cited as an authority to the contrary. But the real question there was whether a county court judge, who had not only made an order for the payment of the rate, but had settled a bonâ fide dispute as to the value, had exceeded his jurisdiction, on the ground that the only tribunal which had power to determine such dispute was one consisting of two justices. There are no doubt certain expressions used by the judges in that case which may be read as pointing to the conclusion that they thought that there must always be a separate inquiry if value was in dispute; but they had not before them the case of a company seeking to enforce a water-rate before justices. It seems to me good sense that there should not be

(1) Law Rep. 10 C. P. 442.

two inquiries, where one will suffice, and it does not seem to me that the words of the section necessitate the conclusion that there must be a separate inquiry. It was urged that it would be very hard on a party who might not be prepared with evidence as to value upon the summons for payment of the rate, if the dispute as to value should be determined on such summons; but if the justices have jurisdiction over such dispute on such summons, he must be taken to know the law and ought to be ready to go into that matter, and it cannot be doubted that, if a party were really surprised, the justices would adjourn the hearing upon his application. For those reasons I think that the magistrates had jurisdiction.

MANISTY, J. I am of the same opinion. The question is whether it is essential, under the 68th section, that there should be a separate and distinct inquiry with regard to the dispute as to value. The appellant was summoned by a summons which called on him generally to shew cause why he should not be ordered to pay the water rate. The appellant knew that he was disputing the value, that being the main question between him and the respondents, and it is impossible to conceive that he would be taken by surprise by the question being raised. If he was, I have no doubt that he could have got an adjournment, if he had applied for one. I am clearly of opinion under these circumstances that the justices had jurisdiction upon this summons to inquire into the question of value. The observations of Bacon, V.C., in *West* v. *Downman* (1), seem to shew that, in his opinion, there is no reason why the justices should not decide the question of value on the same occasion on which they decide whether there is to be an order for payment. It is really part of one and the same question.

Order of justices affirmed.

Solicitors for appellant: *Sandys & Trevenen, for L. D. Browne.*
Solicitor for respondents: *Iltyd Gardener.*

(1) 14 Ch. D. 111.

E. L.

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Nov. 5.

THE CONSOLIDATED CREDIT AND MORTGAGE CORPORATION, LIMITED *v.* GOSNEY.

Bill of Sale—Form—Chattels wearing out—Replacing by others—Power of Sale—Defeasance of Security—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).

A bill of sale of household furniture contained an agreement that the grantor should replace any chattels and things that should be worn out by other articles of equal value, a clause permitting seizure and sale in certain events, and an agreement that the grantee after the sale might retain out of the sale moneys the cost of (among other things) discharging any distress, execution, or other incumbrance on the chattels, and of their removal, warehousing, valuing, or sale. The form in the schedule to the Act permits the introduction of terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security:—

Held, that the expression "defeasance" is large enough to include realization; that the stipulations in the deed related either to the maintenance or the realization of the security; and that the deed was substantially in conformity with the statutory form, and was valid.

RULE for a new trial in an interpleader issue tried at the County Court of Surrey, holden at Croydon.

The Consolidated Credit and Mortgage Corporation, Limited, were claimants under a bill of sale (of household furniture) given by one Mary Marks, dated the 18th of May, 1885, and Gosney was an execution creditor. The bill of sale contained, among others, the following clause: "The mortgagor doth hereby agree and declare that she . . . . will from time to time during the continuance of this security replace such chattels and things as shall be worn out by other articles of equal value, so as to keep up the total value of the said chattels and things to the present value," and a clause entitling the mortgagees in certain events to enter, seize, and sell, and out of the sale moneys to retain the principal sum, or so much thereof as might for the time being remain unpaid, and the interest, "together with all costs, charges, payments, and expenses incurred, made, or sustained by the mortgagees in and about entering upon the said premises, and in discharging any distress, execution, or other incumbrance on the said chattels and things, or any of them, and seizing, taking, retaining, and keeping possession of the said chattels and things,

or any part thereof, and in and about the carriage, removal, warehousing, valuing, or sale (including the cost of inventories, catalogues, or advertising) of the said chattels and things, or any part thereof, and to pay over the surplus, if any, to the mortgagor."

The county court judge gave a verdict for the defendant, the execution creditor, on the ground that the bill of sale did not comply with the requirements of the Bills of Sale Act (1878) Amendment Act, 1882. The ground of the rule was that the judge was wrong in so holding.

Fillan, shewed cause. The objections to this bill of sale are that the covenant to replace goods is, in fact, a mortgage of after-acquired property, and by s. 5 of the Act void except as against the grantor. Further, the clause permitting seizure and sale is so complicated that it is void on the authority of *Melville* v. *Stringer*. (1) The objectionable parts of this clause are the power given to discharge incumbrances out of the proceeds of the sale, and the power to charge for warehousing the goods. The duty of the grantee when he has seized and sold is to hold any surplus for the grantor, and though sale is contemplated by the Act warehousing is not.

Jelf, Q.C. (*C. Haigh*, with him), in support of the rule. The form in the schedule to the Act contains the following clause—"And the said A. B. doth also agree with the said C. D. [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security.*]" Subject to the limitations imposed by ss. 7 and 12 the right to contract is uncontrolled. The clause in this deed as to substituting goods which are worn out is necessary for the maintenance of the security, and the other clauses complained of are not repugnant to any part of the Act and are applicable to the realization, that is, the defeasance of the security.

DAY, J. I think the learned county court judge was wrong in holding that this bill of sale was not in conformity with the statute. It is no doubt provided by s. 9 that a bill of sale made or given by way of security for the payment of money by the

(1) 13 Q. B. D. 392.

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grantor is to be void unless made in accordance with the form in the schedule. But we must put on these words a reasonable interpretation, and hold that substantial though not literal accordance with the form is sufficient. I do not see how a bill of sale can be held to be vitiated by the introduction into it of clauses which are the very gist of the security, as for instance, a power to sell the goods. Yet there is nothing in the Act which expressly authorizes the insertion of such a power, unless, indeed, the term "defeasance" covers such a case. I find it difficult to interpret that word unless it means realization. The word is not apt, but that is the best meaning I can put upon it, and if that is its meaning all the clauses of this deed which are objected to come within one or other of the heads of maintenance or defeasance. The power to replace goods worn out is a matter of maintenance of the security. The clause as to seizure and payment of incumbrances may perhaps come under both heads, at all events it comes under the second. I think none of the stipulations which have been called to our attention can be said to be otherwise than in substantial accordance with the provisions of the Act, and the case must therefore go back for a new trial.

SMITH, J. I am of the same opinion. In *Melville* v. *Stringer* (1) the Master of the Rolls pointed out that the effect of the 9th section was that the form of every bill of sale should be not the same as, but substantially like, that in the schedule, from which nothing should be subtracted, and to which nothing actually inconsistent should be added. That being the law, the question arises if this deed complies with it. Now it was rightly pointed out that the statute says nothing expressly about the sale of the goods except in s. 13, which provides that there shall be no removal or sale for five clear days after seizure. The legislature cannot have supposed that any one would doubt the power to sell, and to make a deed complete it has to be inserted. I agree in thinking that defeasance means getting rid of the deed, that is, doing something which will make it cease to be an operative investment. The realization of the security by seizure and sale has that effect, and therefore clauses to carry this out may be

(1) 13 Q. B. D. 392.

properly inserted. I think the clauses in this deed come under one or other head, maintenance or defeasance, and that the case must go back accordingly to the county court.

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Rule absolute.

Solicitor for plaintiffs: *Basil E. Greenfield.*
Solicitors for defendant: *G. J. & P. Vanderpump.*

A. M.

SVENDSEN *v.* WALLACE.

Nov. 5.

Practice—Costs—Taxation—Fees to Counsel—Refreshers on Argument—Order LXV., r. 27, *sub-rr.* 30 *and* 48.

The power of a taxing master to allow refreshers to counsel is not limited to the cases specified in Order LXV., rule 27, sub-rule 48, and such refreshers can, therefore, in the discretion of the taxing-master, be allowed on an argument before the Court of Appeal.

MOTION to review taxation.

The claim in this action was by the owners of a ship to recover from the cargo owners a general average contribution in respect of expenses incurred. The case was tried before a judge without a jury and resulted in judgment for the plaintiffs. The defendants appealed. The arguments on the appeal lasted for four days, and ultimately the Court of Appeal reversed the judgment entered for the plaintiffs, and dismissed the action with costs in the Court of Appeal and below. On appeal to the House of Lords the judgment of the Court of Appeal was affirmed. (1)

The defendants carried in their bill of costs for taxation, and the master disallowed all the refresher fees paid by the defendants to counsel in the Court of Appeal and attendances in respect thereof, on the ground that such charges were not allowable as between party and party, since Order LXV., rule 27, sub-rule 48, applied, because "expressio unius est exclusio alterius."

Order LXV., rule 27, sub-rule 48, is as follows: "As to refresher fees, when any cause or matter is to be tried or heard upon vivâ voce evidence in open Court, if the trial shall extend over more than one day, and shall occupy either on the first day only or partly

(1) *Svendsen* v. *Wallace*, 10 App. Cas. 404.

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on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing-master may allow, for every clear day subsequent to that on which the five hours shall have expired, the following fees:—(here follows a list of such fees). The like allowances may be made where the evidence in chief is not taken vivâ voce, if the trial on hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the cross-examination of witnesses whose affidavits or depositions have been used."

The defendants appealed to Day, J., at chambers, who referred the matter to the Court.

J. Gorell Barnes (*Myburgh, Q.C.*, with him), in support of the motion. By the 1st rule of Order LXV. the costs of all proceedings are in the discretion of the Court or judge subject to the limitation as to issues tried with a jury. Rule 27 deals with special allowances, but these are governed by the discretion of the taxing-master, for example, sub-rule 9 as to evidence, sub-rule 29 as to unnecessary costs, and sub-rule 30 as to work and labour not otherwise provided for. But for sub-rule 48 no doubt could be raised, for the practice used to be to allow refreshers on arguments in Court, and Jessel, M.R., was wrong in the opinion he gave as to this in *Harrison* v. *Wearing*. (1) But sub-rule 48 is limited in its application to the cases mentioned in it, that is to cases where there is oral evidence. There is nothing in the rules to alter the former practice in other cases, and it cannot be affected by a rule dealing specifically with a particular class of cases.

[He referred to *Edgington* v. *Fitzmaurice* (2) and to the bill of costs in *Turnbull* v. *Janson* (3), set out in the 4th edition of Scott on Costs, p. 836.]

Cohen, Q.C., contrà. The object of sub-rule 48 was to establish a universal practice and to restrict refreshers to cases where there was vivâ voce examination or cross-examination of witnesses in court. Jessel, M.R., in *Harrison* v. *Wearing* (4) pointed out the

(1) 11 Ch. D. at p. 210.
(2) W. N. Aug. 8, 1885, p. 170.
(3) Reported on another point, 3 C. P. D. 264.
(4) 11 Ch. D. 206.

reasonableness of such a rule, because of the uncertainty as to time where there is oral evidence, the probable duration of which cannot be computed. The allowance of refreshers where the evidence is in writing but the witnesses are cross-examined, excludes the like allowance in all cases where there is no oral evidence, and therefore excludes it on arguments either in the Court of Appeal or elsewhere.

J. Gorell Barnes, in reply.

DAY, J. I am of opinion that the master was wrong in disallowing refreshers in this case. I think he misapplied the general maxim that the expression of one thing is the exclusion of others. This is, no doubt, a good general principle to bear in mind, but it is not applicable in a case where a particular subject is being dealt with and there is no intention to deal with any other. What appears to be treated of in sub-rule 48 is the question of refreshers at trials. It does not follow that, because special provisions are made for that case, therefore no refreshers are to be allowed in cases which are not trials, such as hearings before the Court of Appeal. I think the master was mistaken in applying the argument founded on sub-rule 48 to a class of cases not dealt with by that rule. We should, therefore, have to decide the case under the old practice but for sub-rule 30, which seems to me to provide in terms for it. That rule says, "As to any work or labour properly performed, and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed." I have no doubt whatever that an argument in the Court of Appeal or elsewhere comes under the general terms "work or labour." If, therefore, there were any doubt as to the old practice of allowing refreshers on arguments in the Exchequer Chamber being applicable to arguments in the Court of Appeal, that doubt would be entirely removed by the, in my judgment appropriate, language used in sub-rule 30. This application will therefore be granted, and the matter sent back to the master.

SMITH, J. I understand the master exercised no discretion in this case, but decided as a matter of law that no refreshers can

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be allowed in any case on an argument in the Court of Appeal. I think on the true construction of these rules the master was wrong. Before these rules came into force it is conceded that refreshers were allowable upon the argument of special cases and otherwise in the Exchequer Chamber and afterwards in the Court of Appeal, but it is said that the passing of these rules in 1883 altered this practice, and that such refreshers can no longer be allowed. I do not think this is so. Sub-rule 30 seems to me expressly in point, and to keep up the old practice. It is objected that the expression "work or labour" does not apply to counsel, but only to solicitors. But the word "work" is used in sub-rule 38 clearly with reference to work done by counsel. That rule says: "As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing-officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies." It seems to me, therefore, that as sub-rule 38 applies to counsel as well as to solicitors, so also does sub-rule 30 when it speaks generally of fees and does not restrict the expression to solicitors' fees, which, when they are to be dealt with alone are mentioned specifically as in sub-rule 37. But then it is said that sub-rule 48 must be read as excluding the allowance of refreshers in any but what I may shortly call nisi prius cases, or cases in the Court of Chancery where parol evidence is given. I do not read the rule in that way. When it is desired to direct that a thing shall not be allowed, the rules expressly so state, as in sub-rule 44 disallowing retaining fees, and sub-rule 45 dealing with conferences. In my opinion sub-rule 48 is not restrictive, as the master thought it was, and the allowance and amount of the refreshers were in the discretion of the master, and the case must accordingly go back to him.

Application granted.

Solicitors for plaintiffs: *Field & Co.*

Solicitors for defendants: *Waltons, Bubb, & Johnson.*

A. M.

THE GUARDIANS OF THE DORCHESTER UNION, APPELLANTS; THE GUARDIANS OF THE WEYMOUTH UNION, RESPONDENTS. 1885 *Nov.* 6.

Poor Law—Settlement by Residence—Term of Three Years—Irremoveability—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.

In order that a settlement by residence may be acquired under s. 34 of the Divided Parishes Act, 1876, there must have been a residence for three consecutive years under such conditions in each of such years as would have created a status of irremoveability.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

On the 31st of October, 1884, two of her Majesty's justices of the peace for the county of Dorset, upon the complaint of the respondents, ordered that Mary Jane Green should be removed from the respondent union to the appellant union.

Mary Jane Green was married on the 26th of July, 1863, to one George Green, who was born in the year 1810 in the parish of Toller Porcorum in the appellant union. On the 6th of April, 1875, he went to reside in the parish of Overmoigne, in the respondent union, and continued there till his death on the 25th of December, 1881.

George Green during his residence in the parish of Overmoigne, received parish relief for the following periods:—In 1876, during the month of June, medical relief; during the week ending the 30th of December he was supplied with a truss. In 1877, during the week ending the 29th of September, he was supplied with a truss. In 1879, during the week ending the 31st of May, he was given a coffin. In 1880, from the week ending the 24th of January till his death, he received relief.

The settlement of the pauper is the settlement she derived from her husband, after whose death she continued to reside in the parish of Overmoigne, and to receive continuous parish relief therefrom until the week ending the 7th of April, 1883, when she went to reside in the appellant union, and there received continuous parish relief until the 6th day of April, 1884, when she returned to the respondent union and continued to reside there up to the time of the order, receiving continuous parish relief.

The question for the opinion of the Court was whether the order of the justices was right.

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GUARDIANS OF DORCHESTER UNION v. GUARDIANS OF WEYMOUTH UNION.

The Divided Parishes and Poor Law Amendment Act, 1876, by s. 34 enacts: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremoveable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or Court think sufficient."

E. U. Bullen, for the appellants. By 9 & 10 Vict. c. 66, s. 1, no person is to be removed from any parish in which such person shall have resided for five years next before the application for the warrant. By the proviso it is enacted, among other things, that the time during which such person shall receive relief from any parish shall, for all purposes, be excluded in the computation of the time mentioned. That is, as appears by *Reg.* v. *Harrow-on-the-Hill* (1) and *Reg.* v. *Christchurch* (2), the periods of relief and so on are to be treated as non-existent, and the five years are to be computed without regard to them. By 24 & 25 Vict. c. 55, s. 1, five years is altered to three, and by 28 & 29 Vict. c. 79, s. 8, three years is altered to one. Looking at George Green's residence in this way, and excluding periods of relief, it appears that there were three periods of a year, each of which sufficed to confer a status of irremoveability on him. If these three periods are joined, we have him resident for a term of three years, in each of which he was irremoveable from the parish, and he therefore acquired a settlement in the respondent union, and his wife took that settlement, and cannot be removed.

E. Lumley, for the respondents. Sect. 34 of the Act creates a new way of acquiring a settlement, namely, by residence, and for that purpose the expression "term" in the section must receive its usual meaning of a number of consecutive years. In this case there is no term of three consecutive years in each of which years a condition of irremoveability would have arisen. There are not

(1) 12 Q. B. 103. (2) 12 Q. B. 149.

even three detached periods of twelve months of which that could be said. A status of irremoveability and a settlement are different things, and different language is used with regard to them. The legislature has not said irremoveability shall confer settlement, because the latter is much more onerous on the parish than the former, and consequently is made more difficult to acquire. What the statute says is, that three years' continuous residence will confer a settlement provided that in each of the years the residence is such as to give a status of irremoveability. That is not the case here, and the order of the justices was right.

E. U. Bullen, in reply.

DAY, J. I think that the decision of the justices was right and that George Green had not acquired when he died a settlement in the respondent union.

The question turns on the true construction of s. 34 of the Divided Parishes Act, 1876. I agree with the argument that has been addressed to us, that the expression in that section "term of three years," means an unbroken period of three successive years.

It appears that at the time this Act was passed residence for one year rendered a person irremoveable, and that in computing that period of a year the time a person was in prison, and a number of other things, and also the time in which he received parish relief, was to be excluded. The existence of this rule explains the mention of separate years in s. 34, but the principle is not applicable to those years. The section is to my mind explicit, first, that there must be a continuous undivided term of three years: and, second, that each year must be complete, and free from anything which would affect the status of irremoveability by cutting out any portion of the time. That seems to me to be the true construction of the section, and our judgment must be for the respondents.

SMITH, J. I am of the same opinion. This section confers a settlement in certain cases, and does not deal with status of irremoveability. There are two things in the section that render the argument for the appellants untenable, because no construc-

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tion at all is put on them, while they receive their natural interpretation if the argument for the respondents is right. One is the expression "term of three years," the other the expression "in each of such years." I think, therefore, the correct construction is that put on the section by the respondents, that to confer a settlement there must be residence for three consecutive years, in each of which the nature of the residence is such that the residence would have conferred a status of irremoveability.

Judgment for the respondents.

Solicitors for appellants: *Macarthurs, Charlton, & Smith, for A. H. Lock, Dorchester.*

Solicitors for respondents: *Patteson, Wigg, & Co., for G. B. Welsford, Weymouth.*

A. M.

Nov. 30.

THE QUEEN *v.* WHEATLEY AND ANOTHER, JUSTICES OF THE WEST RIDING OF YORKSHIRE.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94, 96—*Nuisance—Order of Justices to abate Nuisance, whether necessary Works should be specified in.*

An order of justices made under s. 96 of the Public Health Act, 1875, upon the complaint of a local authority, required the owner of premises to abate within a specified time a nuisance arising from untrapped drains, "and to execute such works and do such things as may be necessary for that purpose, so that the same shall no longer be a nuisance or injurious to health":—

Held, that this order was bad, because it did not specify what works and things the owner should execute and do for the purpose of abating the nuisance.

RULE for a certiorari to bring up an order of justices.

The applicant, A. Cowburn, was owner of some dwelling-houses in High Street, Liversedge, within the district of the Liversedge Local Board, being the urban sanitary authority of the district.

On the 11th of August, 1885, the applicant was served by the inspector of nuisances to the board with the following notice:—"Take notice that under the provisions of the Public Health Act, 1875, the local board for the district of Liversedge, being satisfied of the existence of a nuisance on property belonging to you situate at High Street, in the occupation of A. G. Sheard,

A. Rollinson, and others, arising from untrapped drains, do hereby require you within three days from the service of this notice to abate the same, and for that purpose to execute such works as may be necessary to completely remove the nuisance, and to effectually prevent its recurrence."

The applicant, not having complied with this notice, was summoned to appear before the justices upon the information of the clerk to the board, and upon the hearing of the summons on the 2nd of October, 1885, the justices made an order under the Public Health Act, 1875, by which order the applicant was ordered and required, as owner of the premises in question, "to abate the said nuisance within one month from the service of this order or a true copy thereof, and to execute such works and do such things as may be necessary for that purpose, so that the same shall no longer be a nuisance or injurious to health."

A rule nisi for a certiorari was obtained on behalf of the applicant to bring up the order on the grounds: (1) that the notice served by the local board was bad because it did not specify the works and things to be executed and done; and (2) that the order was bad on the same ground, and as being based on an invalid notice.

F. Marshall, shewed cause. The order of the justices is good. The notice given to the owner by the local authority follows the words of s. 94 of the Public Health Act, 1875; and it is not necessary that either the notice or the order of justices should specify the particular things to be done by the owner or occupier in order to abate the nuisance. It would be a hardship upon the owner were the contrary construction placed upon ss. 94 and 96. (1)

(1) Sect. 94 of the Public Health Act, 1875, enacts:—

"On the receipt of any information respecting the existence of a nuisance, the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues; or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose."

By s. 95, if default is made in complying with the notice the local authority shall cause a complaint to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom

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The author of the nuisance is most likely to know how best to remove it. The justices may not know the cause of the nuisance, nor how it should be abated, and the result of holding that they were bound to specify what should be done would in many cases be to make the owner incur great expense which turned out to be fruitless. A chimney sending forth black smoke, which is one of the nuisances enumerated in s. 91, may be suggested as an example. The remedy in many cases—as where the chimney belongs to smelting works and the like—depends upon complicated processes, of which an ordinary inspector of nuisances to a local authority could not be expected to have any knowledge. The true construction of s. 96 is that the justices may alternatively order simply that the nuisance be abated, leaving the owner to decide what works and things are necessary for that purpose, or they may themselves specify what should be done. The words "as may be necessary" in s. 94 mean as may be necessary in the opinion of the person to whom the notice is given. It is to be remarked that s. 96 gives larger powers to the justices than simply to follow the notice given by the local authority. They may in addition make an order prohibiting the recurrence of the nuisance. By s. 100 the order may be addressed to the local authority, and it is unlikely that the legislature contemplated that the justices should direct that authority what works and things were to be done. Sects. 94, 95, and 96 are substantially re-enactments of ss. 12 and 13 of 18 & 19 Vict. c. 121, and in *Ex parte The Mayor of Liverpool* (1) an order of justices made

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the notice was served to appear before a court of summary jurisdiction.

By s. 96, "if the Court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, the Court shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose; or an order prohibiting the recurrence of the nuisance and directing the execution of any works necessary to prevent the recurrence; or an order both requiring abatement and prohibiting the recurrence of the nuisance.

The Court may by their order impose a penalty not exceeding five pounds on the person on whom the order is made, and shall also give directions as to the payment of all costs incurred up to the time of the hearing or making the order for abatement or prohibition of the nuisance."

(1) 27 L. J. (M.C.) 89.

under that statute, and in the terms of the order in question here, was upheld.

[MATHEW, J., referred to the forms of notices under s. 94, and of orders under s. 96, given in Schedule IV. of the Public Health Act, 1875.]

It is true that those forms contain directions for inserting the particular works and things to be done, but their use is controlled by s. 317, which provides that those forms, "or forms to the like effect, varied as circumstances may require, may be used, &c." [He also referred to *Barnes* v. *Akroyd* (1), and *Reg.* v. *Whitchurch.* (2)]

A. Charles, Q.C. (*Ashton Cross*, with him), supported the rule. Looking at the words of the Act of 1875, and at the forms given in Schedule IV., it is clear that the legislature intended that if any works were necessary the justices should specify in their order what those works were. They are the persons to decide what works are necessary. The dicta of Cave J., in *Ex parte Saunders* (3) and of Mathew, J., in *Reg.* v. *Llewellyn* (4) support this contention. In *Ex parte The Mayor of Liverpool* (5) the point decided was simply that no appeal would lie to quarter sessions against the order in that case, which is no authority here.

MATHEW, J. I am of opinion that this rule must be made absolute. The order made by the justices is objected to on the ground that it did not specify the works and things required to be done in order to abate the nuisance; and the question for the decision of the Court is whether s. 96 of the Public Health Act, 1875, requires those works and things to be specified in the order. It was argued on behalf of the local board that there need be no specific description in the order of what was necessary to be done to abate the nuisance; that the board in many instances could not ascertain what was best to be done for that purpose; that if the justices gave specific directions in their order the owner might be compelled to incur expense which would turn out to be fruitless, and it was sought to be implied that the Act intended

(1) Law Rep. 7 Q. B. 474.
(2) 6 Q. B. D. 545.
(3) 11 Q. B. D. at p. 194.
(4) 13 Q. B. D. at p. 683.
(5) 27 L. J. (M.C.) 89.

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that the justices might require the owner, who, it was said, would probably best know what should be done to abate the nuisance upon his own premises, to do such things as were necessary to carry out that object. But the answer is that the difficulty cast upon the owner or occupier of the premises would be just as great. If, after he had incurred expense in doing what he thought was necessary, the nuisance was not abated, he might be required by the justices to incur further expense by executing further works, and I cannot think that such a state of things was intended by the legislature. The justices have abundant means of information with respect to the existence of the nuisance, and how it is brought about. The Act provides a penalty for non-compliance with the order, and the terms of the statute must be strictly followed before the owner can be made liable. Looking at the terms of the statute I entertain no doubt that the legislature intended that the justices should decide what works and things should be executed or done. Sect. 92 enables the local authority to inspect premises within their district "with a view to ascertain what nuisances exist calling for abatement under the powers of this Act, and to enforce the provisions of this Act in order to abate the same." They are therefore put in a position to say what should be done to abate the nuisance. Sect. 94 provides that they shall serve a notice upon the person by whose act, default, or sufferance the nuisance arises or continues, or upon the owner or occupier of the premises, "requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose." Now who is to say what works and things are necessary? The justices before whom the question is brought and all the facts of the case appear. Looking at the intention of the legislature as shewn by the language of the Act, I think the sensible interpretation is that the justices, and not the owner or the occupier, should decide what is necessary. But the matter is made still clearer by referring to the forms provided by the Act; and s. 317 provides that the schedules shall be read and have effect as part of the Act, and that the forms contained in Schedule IV., "or forms to the like effect, varied as circumstances may require, shall be used and shall be sufficient for all

purposes." Now Form A. in Schedule IV. is the form of notice applying to the abatement of nuisances, and in that the owner or occupier is required to abate the same, and the notice runs on thus: "and for that purpose to [*state any things required to be done, or works to be executed*]." Again, Form C., which is the form of the justices' order, is in these terms: "We do order the [owner *or* occupier] within [*specify the time*] from the service of this order or a true copy thereof according to the said Act [*Here specify any things required to be done or works to be executed, as for instance, &c.*]." I am therefore of opinion that the legislature has required that the things to be done shall be specified in the order.

SMITH, J. I am of the same opinion. The matter is one of some importance. The question before us frequently arises, and there seems to have been no direct decision upon it. The case of *Reg.* v. *The Mayor, &c., of Liverpool* (1) is no authority in the present case, because this point was not decided. We are therefore at liberty to discuss it here unfettered by authority. I agree with my brother Mathew's view as to the construction of s. 94. The construction contended for on behalf of the local board involves reading the section as if it stopped at requiring the owner to abate the nuisance; because if the notice need not specify the works and things to be done, no meaning is given to the last two lines of the section, "and to execute such works and do such things as may be necessary for that purpose."

I am of opinion, upon the true construction of s. 94, that the notice must be to abate the nuisance within a specified time; and if any works and things are necessary for that purpose those works and things must be specified. Here the notice simply says, "abate the nuisance, and do such things as are necessary, whatever they may be, and we will not tell you what they are." I do not think that the notice complies with the provisions of s. 94; and s. 95 fortifies the view I take of the construction of the Act, because it provides that, if any person on whom notice to abate a nuisance has been served "makes default in complying with any of the requisitions thereof within the time specified," he may be summoned to appear before a Court of summary jurisdiction.

(1) 27 L. J. (M.C.) 89.

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Smith, J.

That provision is useless if the notice may contain no requisition at all, but may be, as it is here, simply a notice requiring the nuisance to be abated. Why should there be provisions enabling the owner to be summoned where he does not comply with requisitions if no requisitions are necessary? I agree with my brother Mathew in what he has said with respect to the forms in Schedule IV., and I think the view he expressed in *Reg.* v. *Llewellyn* (1) is right.

Rule absolute.

Solicitors for applicant: *Bell, Brodrick, & Gray*, for *G. Curry*, Cleckheaton.

Solicitors for local board: *Williamson, Hill, & Co.*, for *Thomas Mitcheson*, Heckmondwike.

W. A.

Dec. 5.

PLUMB *v.* CRAKER.

Practice—County Court—Costs—Discretion—Equitable Jurisdiction—Administration Action—9 & 10 *Vict. c.* 95, *s.* 88—28 & 29 *Vict. c.* 99, *s.* 21.

A county court judge is not bound by the rule in equity which prevailed before the Judicature Acts,—that the plaintiff in an administration suit, properly brought, was entitled to his costs out of the estate. The judge has, by virtue of 9 & 10 Vict. c. 95, s. 88, and 28 & 29 Vict. c. 99, s. 21, an absolute discretion over such costs, and may therefore order the plaintiff to pay the costs of the action, and no appeal will lie against his order.

Cooper v. *Busbridge* (16 L. T. Rep. (N.S.) 5) discussed.

CASE stated by the judge of the Lambeth County Court, in which the following material facts appeared:—

The plaintiff, Anne Plumb, brought an action in the county court as one of the next of kin of John Craker, who died intestate in August, 1884, for the administration of his estate and effects. Mary Craker, who was the widow of the intestate and had obtained letters of administration, was made defendant in the action.

On the hearing certain accounts and inquiries were directed to be taken by the registrar, and the costs of the action were reserved for further consideration.

The registrar having made his certificate, the case was heard on further consideration, when the county court judge made an

(1) 13 Q. B. D. at p. 683.

order directing that a portion of the fund in court be paid to the defendant, amounting, together with the value of certain furniture in her hands, to be retained by her, and together with a balance due from her to the estate as shewn by the certificate, to the sum of 58*l.* 1*s.* 4*d.*, one moiety of the sum of 116*l.* 2*s.* 8*d.*, the amount of the total estate as shewn by the certificate; and that the sum of 58*l.* 1*s.* 4*d.*, the residue of the fund in court, being the other moiety of the total estate, should be distributed among the next of kin (including the plaintiff) to the persons and in the proportions shewn by the certificate. And it was further ordered that the plaintiff should pay to the defendant the costs of or incident to the suit, the same to be taxed by the registrar. The defendant contended that the plaintiff had no right of appeal from the order.

Subject to that contention, the questions for the opinion of the Court were:—

1. Whether the order on further consideration ought not to have provided for the taxation or payment to the plaintiff of her costs of the action out of the funds in court.

2. Whether the plaintiff ought to have been ordered to pay any part of the defendant's costs.

3. Whether the order ought not to have provided for the payment of the defendant's costs out of the balance of the personal estate found due from her by the registrar's certificate.

Cluer, for the defendant. No appeal will lie against the judge's order. Sect. 88 of 9 & 10 Vict. c. 95, gives him an absolute discretion with respect to "all the costs of any action or proceeding in the county court;" and the statute 28 & 29 Vict. c. 99, which gives limited equitable jurisdiction (including jurisdiction in administration suits) to the county courts, provides by s. 21 that this Act and the 9 & 10 Vict. c. 95, and any Act amending or altering the same, "shall be read and construed as one Act, as if the several provisions contained in the said Acts referred to, not inconsistent with the provisions of this Act, were repeated and re-enacted in this Act."

Brabant, for the plaintiff. The question here being whether the judge had jurisdiction to make the order, an appeal will lie. He had not jurisdiction. Order LXV., r. 1, does not apply to costs in the county court, and the judge was bound to follow the

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equity rule, which prevailed before that order was made—that in an administration suit, properly brought, the plaintiff is entitled to his costs out of the estate: Daniell's Chancery Practice, 6th Ed., 1220, 1274; *Farrow* v. *Austin*. (1) Sect. 1 of 28 & 29 Vict. c. 99, confers equitable jurisdiction on county courts, and s. 2 gives the judge in respect of that jurisdiction the powers of a judge of the Court of Chancery. The discretion as to costs given by s. 88 of 9 & 10 Vict. c. 95, must be exercised subject to the equity rule in force when 28 & 29 Vict. c. 91, was passed. *Cooper* v. *Busbridge* (2) is a decision directly in point. [He also referred to *Croggan* v. *Allen* (3) and *McClellan* v. *McClellan* (4).]

HUDDLESTON, B. It seems to me to have been the original intention of the legislature that all questions of costs in small administration suits should be in the discretion of the Court. The object was to prevent small estates being wasted by unnecessary costs. Cases were cited in argument which seem to shew that it was formerly the practice in equity to give costs out of the estate in every case. Order LXV. was intended to remedy that state of things, and it is conceded that, if that order applied to suits in the county court, the judge would have an absolute discretion over the costs. Order LXV., however, does not apply to costs in the county court; but looking at the provisions of the statutes 9 & 10 Vict. c. 95, and 28 & 29 Vict. c. 99, I am of opinion that in substance there is sufficient to confer upon county court judges a discretion equivalent to the discretion conferred by Order LXV. The 9 & 10 Vict. c. 95 is an Act by which jurisdiction is given to the county court in respect of the recovery of small debts, and s. 88 in distinct terms gives the judge an absolute discretion over costs—a discretion full and absolute as that conferred by Order LXV. Does that discretion apply with respect to the equitable jurisdiction given to county courts by 28 & 29 Vict. c. 99? Sect. 1 of that Act gives jurisdiction over administration suits, and s. 21 incorporates 9 & 10 Vict. c. 95, and any Act amending or altering the same, "as if the several provisions contained in the said Acts referred to, not inconsistent with the provisions of this Act, were re-

(1) 18 Ch. D. 58.
(2) 16 L. T. Rep. (N.S.) 5.
(3) 22 Ch. D. 101.
(4) 29 Ch. D. 495.

peated and re-enacted in this Act." The result is that the judge has the same power over the costs of administration suits as is conferred by Order LXV. In the present case he has exercised his discretion, and no appeal will lie from his order.

WILLS, J. I am of the same opinion. The question seems free from doubt when the statutes are looked at. Sect. 21 of 28 & 29 Vict. c. 99—the statute which gave jurisdiction in equity cases to the county courts—incorporates all the provisions of 9 & 10 Vict. c. 95, and therefore incorporates the provisions of s. 88, which says that costs shall be in the discretion of the county court judge. It is contended that his discretion must be limited by the rule which formerly prevailed in courts of equity with respect to costs of administration suits. It is conceded that Order LXV. gives an absolute discretion over those costs, and that it was by that Order intended to repeal the rigid rule in equity; and I have ascertained, after consulting a high authority, that it is now the practice under Order LXV. to exercise an unqualified discretion over costs in administration suits. That being so, I am unable to conceive why s. 88 of 9 & 10 Vict. c. 95—specifically incorporated as it is in 28 & 29 Vict. c. 99—should receive the limited construction which is suggested. The case of *Cooper* v. *Busbridge* (1) was cited as an authority for the proposition that the old rule in equity must be applied in county courts. But the attention of Stuart, V.C., was not called to s. 88 of 9 & 10 Vict. c. 95. I therefore think that case is not an authority binding upon us. I have no doubt as to what was the intention of the legislature. This change in the practice as to costs was made for the purpose of avoiding the temptations to run up unnecessary costs mentioned by Lord Westbury in *Bartlett* v. *Wood*. (2) I am satisfied that our judgment should be for the defendant.

Solicitor for plaintiff: *F. Cotton.*

Solicitors for defendant: *Mead & Daubeny, for Burroughs & Bisdee, Forest Hill.*

(1) 16 L. T. Rep. (N.S.) 5. (2) 4 L. T. Rep. (N.S.) 693; 9 W. R. 817, 818.

W. A.

1885
Nov. 10.

BETTESWORTH, Appellant; ALLINGHAM, Respondent.

Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 *Vict.* c. 70), *s.* 14—*Printing or causing to be printed Bills or Placards without the Name and Address of the Printer, &c.—Evidence of Agency—Joint Conviction for two Offences.*

Upon an information against the appellant under s. 14 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, it was proved that the appellant was a candidate for a seat in the local board of Willesden; that the respondent received from his own servant at his residence a printed address and letter having reference to the election, and purporting to be signed by the appellant, but without the printer's name and address thereon; that this document was printed for publication by instructions conveyed to the printer in a letter from the appellant's brother, who resided with him; and that the printer had debited the appellant with the cost of printing, but had not been paid:—

Held, no evidence that the appellant "printed or caused to be printed" the document in question, within s. 14.

Placards or posters (also without the printer's name or address), printed by the instructions of one Ellis (who was advertised in a local newspaper as the chairman of a committee for promoting the election of the appellant, and who sent the "copy" to the printer), were proved to have been posted about the district at Ellis's expense:—

Whether this was evidence of the printing and posting by an agent of the appellant, *Quære?*

But, the justices having convicted the appellant in one penalty for both the alleged offences, and the conviction being bad as to one of them,—*Held*, that it was bad altogether.

Case stated by justices under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49:—

Upon the hearing of an information laid by the respondent against the appellant on the 20th of April, 1885, under s. 14 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (1), charging that within three months then last past, at

(1) 47 & 48 Vict. c. 70, s. 14, enacts that "Every bill, placard, or poster having reference to a municipal election shall bear upon the face thereof the name and address of the printer and publisher thereof; and any person printing, publishing, or posting, or causing to be printed, published, or posted, any such bill, placard, or poster as aforesaid, which fails to bear upon the face thereof the name and address of the printer and

Willesden, Middlesex, he did print, publish, or post, or cause to be printed, published, or posted, certain bills, placards, or posters having reference to a municipal election, which failed to have on the face thereof the name and address of the printer or publisher thereof, contrary to the statute,—it was proved that the appellant and respondent were candidates for election for a seat in the local board for one of the wards of the district of Willesden; and that the respondent received *from his servant* at his residence the address and letter marked A., annexed to the case, and which purported to be signed by the appellant, inviting the rate-payers to vote for him at the approaching election. It had no name or address of the printer or publisher thereon.

It was also proved, and admitted, that a certain number had been printed for publication, by instructions conveyed to the printer in a letter from a Mr. Frederick Bettesworth, the brother of the appellant, and with whom he resided; and that the printer had debited the appellant with the cost of printing them, but had not then been paid.

With respect to the notice, of which a copy marked B. was annexed to the case, it was proved that the respondent was in and about Willesden Lane on the 11th of March last, when he counted thirty-one posters or placards, of which a copy, marked B., was annexed to the case, inviting owners and rate-payers to "vote for Bettesworth," exposed to view, and on none of them did the

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publisher, shall, if he is a candidate, be guilty of an illegal practice,* and, if he be not a candidate, shall be liable on summary conviction to a fine not exceeding 100*l.*"

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* Sect. 7. "A person guilty of an illegal practice in reference to a municipal election shall on summary conviction be liable to a fine not exceeding 100*l.*, and be incapable during a period of five years from the date of his conviction of being registered as an elector or voting at any election (whether it be a parliamentary election or an election for a public office within the meaning of this Act) held for or within the borough in which the illegal practice has been committed."

Sect. 8. "An illegal practice within the meaning of this Act shall be deemed to be an offence against Part IV. of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50); and a petition alleging such illegal practice may be presented and tried accordingly."

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printer's name and address appear, nor the name and address of the publisher; and that, on the 18th of March last, the respondent was again in and about Willesden, when he saw a number of similar placards or posters exposed to view, *having the printer's name and address on them*, which covered or partly covered some of those which he had seen on the 11th of March; but seventeen still remained exposed to view without the printer's name and address thereon.

It was proved that these placards or posters had been printed by the instruction of one James Ellis (who was also charged with the same offence, and convicted, under the same section, and whose case was heard before that of the now appellant), who was admitted to have been advertised in a local newspaper as the chairman of a committee formed for the promotion of the appellant's election as a member of the local board, and that he (Ellis) gave instructions for the printing of the placards, and indeed sent the "copy" to the printer.

It was proved by a bill-poster that he had posted fifty placards or posters about the district, similar to that set forth, prior to the 6th of March last, which had not the printer's name and address thereon, and was paid by Ellis for posting them; and that he subsequently posted placards or posters similar to the foregoing, but on which were the printer's name and address, and for these also he was paid by Ellis.

On the part of the appellant, it was contended,—1. That the bill, placard, or poster marked A. was not a bill, placard, or poster within the meaning of s. 14 of 47 & 48 Vict. c. 70,—2. That it was not proved to have been printed, posted, or published by or with the authority or knowledge of the appellant; and especially that, as to its publication, the fact of a copy having been handed to the respondent by his servant was not sufficient, in the absence of any proof as to how the servant obtained it. With respect to the bill, placard, or poster marked B., it was urged that there was no evidence connecting the appellant with the printing or posting or with any personal knowledge of it; and that he could not be convicted by reason only of the conduct in the matter of Ellis; that Ellis was not his agent for this

purpose; and that the announcement by a newspaper that he (Ellis) was chairman of a committee to promote his election, was not sufficient to justify his conviction.

The justices, being of opinion that the documents A. and B. respectively were bills, placards, or posters within the meaning of the Act, and that the appellant was liable for the acts of James Ellis and Frederick Bettesworth, who were his agents for this purpose, in printing, publishing, and posting them, convicted the appellant, and adjudged him to pay a penalty of 10*l.*, and costs.

The question was whether this determination was erroneous in point of law.

Joseph Walton, for the appellant, was stopped by the Court.

E. R. Bartley Denniss, for the respondent. There was abundant evidence to warrant the conclusion the justices came to, viz. that the illegal acts alleged were done by Frederick Bettesworth and James Ellis as the agents of the appellant. The appellant and his brother were living in the same house; and it was proved that Frederick Bettesworth gave instructions for the printing of the circular A. And, as to the placard B., it was shewn that Ellis, who supplied the "copy" to the printer, and who employed and paid the bill-poster, was chairman of the appellant's committee, and an active promoter of his candidature. As to both, therefore, there was at least a strong primâ facie case. Agency under this Act is not to be construed as in the case of an ordinary commercial agency. If he had any defence to the charge, the appellant might have availed himself of the extraordinary power vested in the Court under s. 20 of the Act.

DAY, J. This case involves some very important questions which it is unnecessary for us now to determine. I do not propose to put any construction upon the Act; but simply to deal with the facts of the particular case. It is enough to say that a man does not bring himself within the penalty of the 14th section unless he prints or causes to be printed a bill, placard, or poster which has not upon it the printer's name and address. Whatever I may suspect, the evidence stated to us does not prove to my satisfaction that the appellant did print or cause to be printed

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the document set out in the case and marked A. I am not going to consider the placard or poster marked B. It is sufficient to say that there is no evidence to warrant the conviction as to the letter and notice A.; and, the conviction being for both of the offences charged, with one entire penalty, the conviction is bad. The penalty is not divisible. And I must say I decide this with very great pleasure.

SMITH, J. I also think there is no evidence upon the case as stated by the justices that Frederick Bettesworth was the agent of his brother, the appellant, to print or cause to be printed the smaller document marked A. The instructions to the printer seem to have been conveyed by Frederick, who resided with his brother. It is, however, quite consistent with all the evidence that Frederick Bettesworth was a mere volunteer: and it is incumbent on the prosecutor to make out a complete case. It is true the printer made out the bill to the appellant: but the appellant has not paid for the printing. As to the handbill and letter, therefore, the case wholly failed. As to the placard or poster marked B., it is unnecessary to decide whether or not there was evidence sufficient to establish the agency of Ellis. The conviction was for both offences, with a single penalty. The appeal must be allowed with costs.

Appeal allowed.

Solicitors for appellant: *Learoyd & Co.*
Solicitor for respondent: *Theodore Allingham.*

J. S.

KIRK *v.* COATES.

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Nov. 14.

Adulteration—Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Representation as to Quality—Sale.*

To constitute an offence under s. 6 of the Food and Drugs Act, 1875, the representation of the "nature, substance, and quality" of the article must be made at the time of the sale. A prior false representation in this respect is no offence within the Act, provided a true one is made at the time the sale actually takes place.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions held at Huddersfield on the 27th of May, 1885, an information preferred by E. G. Kirk, the sanitary officer of the borough, against Benjamin Coates, under s. 6 of the Food and Drugs Act, 1875 (1), for having unlawfully sold to the prejudice of the purchaser, Kirk, one pint of milk which was not of the nature, substance, and quality demanded by the purchaser, was heard by the justices, and dismissed. The facts were as follows:—

The respondent was found by the appellant carrying in his hand a small milk-can which he informed the appellant contained new milk. The respondent had a cart with him, in which were placed four milk-cans, three large and one small. Two of the large cans were at the rear portion of the cart; and the respondent informed the appellant that the can on the near side contained "new milk," and the one on the off side "old milk." The appellant next inquired of the respondent what was contained in

(1) 38 & 39 Vict. c. 63, s. 6, enacts that "no person shall sell to the prejudice of the purchaser any article of food, or any drug, which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*."

The Amendment Act of 1879 (42 & 43 Vict. c. 30), s. 2, enacts that, "in any prosecution under the provisions of the principal Act for selling to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, it shall be no defence to any such prosecution to allege that the purchaser, having bought only for analysis, was not prejudiced by such sale: neither shall it be a good defence to prove that the article of food or drug in question, though defective in nature or in substance or in quality, was not defective in all three respects."

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the two cans (one large and one small) in the front of the cart; and the latter replied "new milk." The appellant went to his assistant (who was a short distance off) to obtain bottles for the purpose of obtaining a sample of milk, having the cart in sight from this time until he returned to obtain a sample.

On returning to the cart, the appellant placed his hand upon the large can in front (which the respondent had previously told the appellant contained new milk), and at the same time said to the respondent, "Let me have a pint of milk out of this can, which you have just told me is new." The respondent hesitated, and then said, "That is old milk." The appellant said: "How is it that you first told me it was new?" and insisted on being supplied with one pint of the milk, for which he paid 1*d.*, the ordinary and proper price in the district for a pint of "old milk."

The expression "old milk" is understood in the district to mean milk which has stood for twelve hours, and from which the cream has been removed.

The several requirements of the Food and Drugs Act, 1875, were duly complied with; and a sample was submitted to the borough analyst, from whose certificate it appeared that the sample had been impoverished by the removal of at least 52 per cent of its butter fat. The sample contained 1·43 butter fat, and 10·21 of solids not fat. This was admitted to be a good result for "old milk," but below the standard for pure unimpoverished milk.

It was contended for the appellant, that, when the respondent had once stated that the milk was "new," he could not, on finding that the milk was required for analysis, evade the statute by disclosing the real nature of the milk, viz. by stating that it was "old milk," even though he did so before the sale actually took place; and, further, that, if he could do so, he ought not only to have stated that it was "old milk," but also that the cream had been abstracted.

The justices were of opinion that, as the real nature of the milk had been disclosed to the appellant before the sale took place, no offence had been committed, and they dismissed the summons.

The question for the Court was, whether the respondent, having

brought to the knowledge of the appellant the real nature of the article before the sale actually took place, was liable to be convicted of having *sold* milk "to the prejudice of the purchaser, which was not of the nature, substance, and quality demanded,"—he having previously stated that the milk was "new milk."

Moorsom, Q.C., for the appellant. The justices ought to have convicted the respondent. The facts disclosed by the case shew a clear attempt to evade the statute. The respondent represented the milk he was offering for sale to the customer as "new milk," when in reality it was skimmed, or, as it is called, "old" milk. He offers it as new milk.

[MANISTY, J. When? Before the sale actually took place. At the time he sold it, the respondent told the purchaser that the can from which he demanded to be supplied contained "old milk."

SMITH, J. He intended to cheat, but he did not cheat. Telling a lie is not an offence within s. 6.]

The sale was complete, and the offence was committed when the respondent first told the appellant that the can contained new milk.

At all events, to describe a liquid from which so large a proportion of butter fat as 52 per cent. has been removed as milk, was an offence within the Act. The fact that substantially all the cream had been abstracted should have been disclosed.

[MANISTY, J. The result of the analysis, according to the facts stated, shews a very good result for "old milk."]

Unless the evidence here stated discloses an offence within s. 6, it will be impossible ever to obtain a conviction for the sale of adulterated milk.

The respondent did not appear.

MANISTY, J. In my opinion the justices came to a correct conclusion. The language of s. 6 of 38 & 39 Vict. c. 63, is clear enough as applied to a *sale* of an article which is not of the nature or quality demanded. There was no sale here until the respondent had informed the appellant that the article he was buying was old and not new milk. The fact of his having previously told the appellant that the contents of the particular can was

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new milk cannot alter that which took place at the time of the sale. In reality the corporation want a new law, declaring that the having in his possession for sale, and offering for sale, an inferior or adulterated article for a genuine one shall render a person liable to a penalty. There is no such law at present existing.

SMITH, J. I am entirely of the same opinion. The second point is stated out of Court.

Judgment for the respondent.

Solicitors for appellant: *Bolton, Robbins, Busk, & Co.*

J. S.

Nov. 26.

PALEY *v.* GARNETT & SONS.

Master and Servant—Employers Liability Act, 1880 (43 & 44 *Vict. c.* 42)—*Defective Machinery.*

The plaintiff, a lad of nineteen, was employed in the defendants' paper-mill at a machine for cutting jute. The material passed under a roller which conveyed it to the cutter; but the roller being in several pieces or sections, with interstices between them into which the jute sometimes got and so impeded the action of the machine, it was necessary (or usual) to remove it by the hand. In doing this the plaintiff lost three fingers. The defect had been pointed out to the defendants, who to remedy it procured a roller *in one piece*; but the accident happened before the new roller was placed. The maker swore that, with care, both rollers were equally safe.

The jury having found that the injury to the plaintiff was caused by a defect in the machine known to the defendants and not remedied by them:—

Held, that this finding was warranted by the evidence.

ACTION under the Employers Liability Act, 1880 (43 & 44 Vict. c. 42), tried (with a jury) in the county court of Yorkshire holden at Otley.

The plaintiff in his evidence in chief said: "I have worked in Messrs. Garnetts' mill about twelve months. They are paper-makers. They have a cutting-machine in the mill. I was put to work the machine seven or eight months before the injury. The foreman shewed me how to use it. I had to cut rags or jute with it. It (the jute) was put on the stand or table before the machine, and then I put it under the feeder, which took it to the chopper.

The feeder is an iron roller which revolves within iron sides. The roller is in eight parts or segments, which are about one-eighth of an inch apart. The jute used to get between the segments and go round the feeder instead of going under it. This happened constantly. I complained to Mr. Harry Garnett. I heard him speaking of a new roller; and I told him the old roller was always catching. A new roller came in about January last, but was not put in. I asked Mr. Garnett why it was not put in. He said it would be put in some time when the mill was stopped. The mill was worked by water-power. I also spoke to his father Mr. Jeremiah Garnett about it. He made no answer. About a week after I saw Mr. Harry; and I asked him if the new roller could not be put in the following week. I said the old one was a lot of trouble, through the jute catching, and that the new one would be better. The new roller was in one piece, and not in segments. He did not give me a decided answer. I went on working till the 30th of April. The mill had stopped many times between the time the new roller came and then. On the 30th of April a girl put some jute on the stand before me as usual, and I put it through the feeder to the chopper. There is a lever which is worked by the foot, and which lifts the feeder up so as to enable the jute to be put under it. It lifts the roller (the feeder) perhaps four inches. On this occasion I used the lever, and put the jute under. I saw the roller catch the jute between the joints, and I put my hand to pull the lump of jute out; and it caught my fingers between the jute and the roller. The roller caught my finger, and carried it round as it should the jute. Then the knife, which was coming down to cut the jute, caught my hand and brought it down to the set knife, which is fixed behind and a little below the roller, and cut three fingers off at the second joint. If the new roller had been in, the jute could not have caught. There is another chopping-machine, a large one, at the mill. That is in one piece like the new roller."

On cross-examination the plaintiff said, "Mr. Harry told me the new roller was got because the old one caught the jute."

It was submitted for the defendants that there was no proof of any defect in the machine, and that the accident happened through the plaintiff's carelessness.

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The judge declined to nonsuit.

On the part of the defendants, the manufacturer of the machine was called. He stated that the machine was properly constructed, and not dangerous if used with proper care; and that the only reason for making the roller in sections is that when so made it can be more easily taken to pieces: it would not be safer.

Dr. Richards, who had been a government inspector of factories for twenty-seven years, said: "I have inspected this machine. With ordinary care, it may be used without injury to the person using it;" and, on cross-examination he said, "I have seen the machine at work. It is my duty to call attention to machinery which I think is dangerous. I never called attention to this machine."

A witness who had worked the machine before and since the accident, said that there was no difficulty about it, and that the one roller was quite as safe as the other.

The judge told the jury that the machine was not necessarily defective because they might think the new roller a safer or better one; and he left it to them to say whether the accident was attributable to a defect in the construction of the machine, which the defendants had neglected to remedy, or to want of proper care in the use of it by the plaintiff, who was acquainted with it and with the way in which it performed its functions.

The jury found for the plaintiff, with 31*l.* 4*s.* damages.

A. Powell shewed cause against a rule for a new trial or to enter judgment for the defendants, obtained by *Robbins* on the ground that there was no evidence to warrant the finding of the jury that the machine used in their mill was defective or dangerous. He submitted that the case was properly left to the jury, and that there was abundant evidence to justify their finding that the roller in question was defective in construction, that such defect was known to the defendants, and was the cause of the injury sustained by the plaintiff, and not any carelessness on the part of the plaintiff himself.

Robbins, contrà. To constitute a defect in the condition of the machinery used in the business of the employer, within the meaning of this Act, it must be such a defect as necessarily to

cause additional and undue danger to the person using it. Of that there was no evidence whatever. All the evidence, on the contrary, tended to shew that the machine was properly constructed, and that the accident arose entirely from the carelessness of the plaintiff himself in feeding it. Before he put his hand where he did to release the jute which impeded the action of the roller, he might have easily stopped it by throwing it out of gear.

MATHEW, J. The sole question here is whether the county court judge was wrong in leaving the case to the jury upon the evidence before them. The evidence was in substance this,—The plaintiff was employed in the defendants' mill to pass rags and jute through a mill for the purpose of cutting them. The roller which constituted the feeder was constructed in eight sections which were about an eighth of an inch apart. It was found that the material to be cut (jute) sometimes got into these interstices, and so got round instead of under the feeder, and required to be removed. In removing an obstruction of this sort the plaintiff's hand got drawn in, and three of his fingers were amputated. The defect in the roller had been pointed out to the defendants before the accident happened; and a new roller (in one piece) had been procured, but had not yet been attached to the machine. I think there was abundant evidence from which the jury might fairly and reasonably infer that the machine was defective, and that the employers knew of the defect and had failed to remedy it. There was no reason for getting a new roller, but because the old one was defective. I think the jury under the circumstances were justified in finding that the negligence of the employers was the cause of the injury sustained by the plaintiff.

SMITH, J. I am of the same opinion. It was purely a question of fact for the jury; and, if there was any evidence to warrant the finding, we cannot interfere. The complaint on the part of the plaintiff is, that the machine upon which he was set to work was defective, that this defect was known to the employers and not remedied by them, and that he sustained injury through their neglect. Now, it is clear that the roller was defective. It was in eight segments, with interstices of an eighth of an inch between

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them, and in these the jute was always catching. To remedy that, a new roller in one piece was procured; but before it had been placed in the machine the accident happened. It was said that this was not a defect of machinery within the Act. That argument is I think disposed of by the case of *Heske* v. *Samuelson & Co.* (1) "The question," said Lord Coleridge, C.J., "is whether the fact that the machine was unfit for the purpose for which it was applied, constitutes a 'defect in its condition' within 43 & 44 Vict. c. 42. The question really almost answers itself. If it was not in a proper condition for the purpose for which it was applied, there was a defect in its condition within the meaning of the Act:" and Stephen, J., says: "The condition of the machine must be a condition with relation to the purpose for which it is applied." This machine in its then condition was clearly unfit,—notwithstanding what was said by the maker of it and by the government inspector of factories,—for the purpose for which it was used; and the defendants knew it. The jury found that the injury sustained by the plaintiff was the direct consequence of that defectiveness; and, I think, rightly so found. If there was contributory negligence on the part of the plaintiff, that was for the jury.

Rule discharged.

Solicitor for plaintiff: *Henry Ikin, for Child & Groom, Otley.*
Solicitors for defendants: *Radford & Frankland.*

(1) 12 Q. B. D. 30.

J. S.

FORD *v.* MIESCKE. 1885

Practice—Writ of Summons—Service out of the Jurisdiction—Certificate in lieu of Affidavit of Service—Foreign Law. *Nov.* 16.

Under Order XIII., r. 2—which requires that before taking proceedings upon default of appearance to a writ of summons, the plaintiff shall file an affidavit of service or of notice in lieu of service, as the case may be—the Court, where notice of a writ is served out of the jurisdiction, has no power to allow a certificate of service to be filed in lieu of an affidavit, even where it appears that by the foreign law the process server cannot make an affidavit as prescribed by r. 2.

MOTION for an order dispensing with an affidavit of the service of notice of the writ on the defendant, a foreigner, residing out of the jurisdiction, and for leave to sign judgment.

It appeared that the writ was issued for service on the defendant, a German subject, residing at Colberg, Pomerania. The writ was forwarded to the British consul for Pomerania with instructions for service, and notice of the writ in the proper form was personally served on the defendant by the official bailiff or process server, but it was stated that the affidavit prescribed by Order XIII., r. 2 (1), could not be procured, for no German official was able to take oaths in the English form. It was further stated that by the law of Pomerania the attestation of a process server obtained public belief because he had taken an oath of office, by reason of which he gives his attestations, and the notice of the writ was returned with a memorandum of the service and of the place and date of service indorsed on it, and signed by the process server. It was added that the British consuls had received instructions from the Foreign Office not to administer oaths of any description to German subjects.

The Hon. Bernard Coleridge, in support of the motion. It is clearly shewn that the foreign law makes it impossible to furnish the affidavit prescribed by Order XIII., r. 2, and the Court, in the interests of justice, will dispense with it, if it is satisfied that the notice has been personally served.

(1) Order XIII., r. 2: "Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following rules of this Order—he shall, before taking such proceeding upon default, file an affidavit of service or of notice in lieu of service, as the case may be."

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POLLOCK, B. We cannot entertain the application. The terms of the rule are precise, and there are no means of departing from them.

MANISTY, J., and SMITH, J., concurred.

Motion refused.

Solicitors for plaintiff: *J. E. Fox & Co.*

A. P. S.

Nov. 25.

WHITE *v.* THE BURIAL BOARD FOR NORWOOD, MIDDLESEX.

Ecclesiastical Law—Formation of Districts under 6 & 7 *Vict. c.* 37*—Burial Board—Cemetery—Sexton's Fees.*

The precinct or chapelry of N. became long before 1859, by augmentation of Queen Anne's bounty, a perpetual curacy and was treated as a separate and distinct parish for all civil purposes,—baptisms, marriages, and burials being performed in the chapel and the burial-ground thereto belonging. In 1850, a portion of the precinct of N. was assigned to St. John's Church, Southall, which district became under 6 & 7 Vict. c. 37 and other Acts a new parish for all ecclesiastical purposes.

By Order in Council of May, 1859, the chapelry of N., except the part so assigned to St. John's, was constituted a separate parish for ecclesiastical purposes; and the chapel became the parish church of N. In 1860, a piece of land adjoining St. John's Church, which had been conveyed to the ecclesiastical commissioners for the purpose of a burial-ground for that district (there having been previously no burial-ground within the district, and the parishioners thereof having been buried in the churchyard of N.) was consecrated as such burial-ground, and used as the burial-ground both of the parish of St. John and the perpetual curacy of N. The sexton of St. John's performed the duties and received the fees for interments in the churchyard of St. John's. By an Order in Council of September, 1880, a portion of the parish or perpetual curacy of N. was assigned to St. John's, and became under the provisions of 32 & 33 Vict. c. 94, s. 1, a part of that parish.

In 1881, a burial board was formed for the whole poor-law parish of N. (including St. John's and the perpetual curacy of N.), and they provided a cemetery for the whole district,—the churchyard at N. being closed for burials.

The statute under which the Orders in Council were made (6 & 7 Vict. c. 37) makes provision for all other persons affected by the change, but is silent as to the position of the sexton and his fees:—

Held, that the plaintiff (who had been appointed sexton of N. in 1865) was not entitled to fees in respect of burials in the cemetery from that portion of the parish of N. which had been annexed to the parish of St. John; but that the burial-board had a right to apportion the burial fees in accordance with the limits of the two parishes.

SPECIAL CASE. 1. The plaintiff's claim is as sexton of the ecclesiastical parish of Norwood, Middlesex, for sexton's fees.

2. The poor-law parish of Norwood, Middlesex, is conterminous with what was the ancient precinct or chapelry of Norwood, in the parish of Hayes, Middlesex, which precinct or chapelry became, long before 1859, by augmentation of Queen Anne's bounty, a perpetual curacy. It was for a long series of years before 1859 treated as a separate and distinct parish for all civil purposes; and baptisms, churchings, marriages, and burials were performed in the church or chapel of the chapelry and the burial-ground thereto belonging, and the chapelry had its own churchwardens, overseers, and other parish officers, and was in no way connected with any other parish in respect of rates of any kind.

3. By an order of the commissioners for building new churches, dated the 25th of April, 1850, made under and in pursuance of the Acts therein recited, a portion of the precinct of Norwood was assigned to St. John's Church, Southall.

4. By the provisions of 19 & 20 Vict. c. 104, the district so assigned to St. John's became a new parish for ecclesiastical purposes under 6 & 7 Vict. c. 37 and Acts amending the same.

5. By an Order in Council under 1 & 2 Vict. c. 106, and 2 & 3 Vict. c. 49, dated the 13th of May, 1859 (copy annexed to the case), the chapelry or precinct of Norwood, except that part so assigned and forming the parish of St. John as above stated, was constituted a separate parish for ecclesiastical purposes as well as a perpetual curacy and benefice by the name or style of the perpetual curacy of Norwood, of which the church or chapel in and belonging to the said chapelry should be the parish church.

6. In the year 1860, a piece of land adjoining St. John's Church, Southall, which had been previously conveyed to the ecclesiastical commissioners for the purposes of a burial-ground for that district (there having been previously no burial-ground within the district, and the parishioners thereof having been previously buried in the Norwood churchyard,) was duly consecrated by the bishop of the diocese as such burial-ground.

7. From the date of the consecration of the churchyard, the same was by arrangement used as the burial-ground not only of the parish of St. John's but also for the perpetual curacy of Norwood, the inhabitants of the whole precinct or poor-law

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parish of Norwood dying within it being (except as stated in par. 10) buried in the said burial-ground.

8. The sexton of St. John's performed all the duties and received all the fees for all the interments in the churchyard of St. John's.

9. For the purposes of this case only, it was admitted that the plaintiff was appointed sexton of the ecclesiastical parish of Norwood in 1865.

10. From the date of the plaintiff's appointment there have been only fifteen common graves dug and seventeen interments in the vaults and brick graves in the churchyard adjoining Norwood church; all other interments of inhabitants of the whole of the precinct of Norwood having taken place in the churchyard of St. John's Church, as stated in par. 7.

11. By an Order in Council dated the 6th of September, 1880, a portion of the parish or perpetual curacy of Norwood was assigned to the parish of St. John, Southall, and became under the provisions of 32 & 33 Vict. c. 94, s. 1, part of that parish.

12. When the plaintiff was first appointed sexton of Norwood, the then curate handed to him the scale of fees following:—

	Minister.			Sexton.			Clerk.		
	£	s.	d.	£	s.	d.	£	s.	d.
New vault	10	10	0	5	5	0	1	0	0
Brick grave	4	4	0	3	3	0	0	10	6
Surplice fees for above	1	1	0	0	16	8	0	10	6
Common grave	0	2	0	1s. pr. ft.			0	1	0
Tolling bell for above		..		0	1	0		..	
Grave-rail	1	7	6	0	5	0		..	
Head and foot stone	2	0	0	0	5	0		..	
Slab or ledger	2	12	6	0	7	6		..	
Opening vault	2	2	0	1	1	0	0	10	6
Ditto brick grave	1	1	0	0	10	6	0	5	0
Publishing banns	0	1	6		..		0	1	0
Marriage by banns	0	5	0		..		0	2	6
Ditto by license	1	1	0		..		0	10	6
Certificate of marriage	0	2	6		..			..	
Churching a woman	0	1	0		..			..	
Passing bell		..		0	2	6		..	
Turfing grave		..		0	2	6		..	

The plaintiff has always acted upon this scale, and has received the several fees therein mentioned in respect of interments in the

churchyard attached to the church. The scale was not exhibited in the vestry, nor (save as aforesaid) ever duly sanctioned or established by prescription, usage, or otherwise.

13. In June, 1881, a burial-board was formed, under the provisions of 15 & 16 Vict. c. 85, 16 & 17 Vict. c. 134, and the other Acts amending the same or relating thereto, for the whole precinct or poor-law parish of Norwood, including, therefore, the parish of St. John, Southall, and the parish or perpetual curacy of Norwood; and such burial-board proceeded to provide a cemetery for the burial-board district, which was opened on the 25th of March, 1883.

14. On July 19th, 1883, the churchyard at Norwood was closed for burials, by Order in Council.

15. The burial-board have, under 15 & 16 Vict. c. 85, revised and settled a scale of fees (a copy was annexed), and such scale of fees has been duly approved.

16. Under the regulations of the burial-board, the depth of a common grave in the cemetery is 9 feet.

17. The plaintiff claimed to be entitled to fees for forty-five persons buried in common graves in the cemetery in 1883 and 1884.

18. Of these forty-five persons, eight died in the ecclesiastical parish of Norwood as constituted after the Order in Council of 1880, and were parishioners; and these graves were dug by the plaintiff. One was a non-parishioner, and did not die in the parish; but his grave was dug by the plaintiff at the request of the defendants. The remaining thirty-six died in that portion of the parish of St. John, Southall, which was added by the Order in Council of the 6th of September, 1880; thirty-five being parishioners and one a non-parishioner. These thirty-six graves were dug by the sexton of St. John's, and the fees for such thirty-five graves are claimed by him.

19. The plaintiff contends that he is entitled to sexton's fees in respect of all the forty-five graves, at the rate of 9*s.* 6*d.* for parishioners whether of Norwood or St. John's, and 19*s.* for non-parishioners.

20. The defendants contend that the plaintiff is entitled to fees in respect of nine only of such graves, viz. those of the eight persons who died in the parish of Norwood and the one whose

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grave was dug by the plaintiff at the defendants' request, as stated in par. 18, and at the rate of 3*s.* 6*d.* for parishioners, and 7*s.* for non-parishioners. This amount the defendants had tendered to the plaintiff before action, and had paid into Court. The defendants contend that the plaintiff is not entitled to fees in respect of the remaining thirty-six graves, on the ground that they were not graves of parishioners of the parish of which the plaintiff is sexton, or of persons whose graves were dug by the plaintiff at the request of the defendants.

21. The plaintiff also claimed to be entitled to 5*s.* for a grave-rail or kerb for one person buried in the cemetery who died within the area added to St. John's in 1880. The defendants contend that the plaintiff is not so entitled, or, if so entitled, cannot recover the sum from the defendants.

22. The plaintiff further claims to be entitled to two sums of 7*s.* 6*d.* each for slabs or headstones for two persons buried in the cemetery of the burial-board. These persons died, one of them in the area still a portion of Norwood parish, and the other in the area added to St. John's in 1880. The defendants contend that the plaintiff is not so entitled, or, if so entitled, cannot recover those sums or either of them.

23. The plaintiff further claims to be entitled to twenty sums of 2*s.* 6*d.* each for turfing graves of twenty persons buried in the cemetery of the burial-board. Of these twenty persons four died in the area still a portion of Norwood parish, and the remainder died in the area added to St. John's in 1880. The plaintiff did not turf any of these graves. The defendants contend that the plaintiff is not so entitled.

24. The defendants have collected and received the fee of 3*s.* 6*d.* for each common grave in the cemetery and the other fees as fixed by the scale of fees mentioned in par. 15.

The questions for the opinion of the Court were, whether the plaintiff had any, and, if any, what rights in respect of his said claims, or is entitled to recover from the defendants any, and, if any, what fees in addition to the amount paid into Court.

Nov. 24, 1885. *Jeune*, for the plaintiff, submitted that, notwithstanding the alteration made in the respective parishes of

Norwood and St. John by the Orders in Council referred to in the special case, the plaintiff, as sexton of Norwood, was still entitled to the fees in respect of all interments from that part of the parish of Norwood which had been annexed to St. John's, as if no dismemberment of the parish had taken place. The argument consisted of a minute examination of the several statutes bearing upon the question, and especially the following, viz. 6 & 7 Vict. c. 37, s. 9; 7 & 8 Vict. c. 94, s. 9; 15 & 16 Vict. c. 85, ss. 32, 34, 37; 18 & 19 Vict. c. 128, ss. 7, 9; 32 & 33 Vict. c. 94, s. 1.

Charles, Q.C. (with whom was *Claude C. M. Plumptre*), for the defendants, contended that the plaintiff was not entitled to burial-fees in respect of those persons who died in that portion of the old parish of Norwood which was by the Order in Council of September, 1880, annexed to the parish of St. John.

[Some discussion took place as to which of the two scales of fees referred to in the case was to govern,—that mentioned in par. 12, or that prepared by the burial board and mentioned in par. 15; and also as to the plaintiff's claim in respect of grave-rails or kerbs, head and foot stones, ledgers, and turfing: but these, in the result, became immaterial.]

Cur. adv. vult.

Nov. 25. The judgment of the Court (MATHEW and SMITH, JJ.) was delivered by

MATHEW, J. This was a special case stated to determine the right of the plaintiff to burial-fees in respect of a portion of the parish of Norwood, which had under an Order in Council been detached from that parish (Norwood) and annexed to the adjoining parish of St. John.

The plaintiff claimed, notwithstanding the division made under the Order in Council, to be entitled to the fees in respect of the interments from that portion of the parish of Norwood which had been annexed to the parish of St. John; and it appeared from the statements in the case that the district now occupied by the two parishes of Norwood and St. John had originally been one ecclesiastical district, and as far back as the year 1850 an Order in Council had been obtained under the provisions of 6 & 7 Vict.

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c. 37, to divide that ecclesiastical district into two parishes. That order was followed by another order in the year 1859, which constituted the two parishes of Norwood on the one hand and St. John on the other. The plaintiff had been appointed sexton of Norwood in the year 1865. If he had been sexton in the year 1850, the same question in principle would have arisen then that arose in the year 1880, but he was not the sexton then, and was not appointed till the year 1865.

In the year 1880, a further Order in Council had been obtained which transferred (as I have said) a part of the then parish of Norwood to the parish of St. John; and the plaintiff, who was then sexton of the parish of Norwood, claimed the fees in respect of the interments from that portion of the parish of Norwood which was annexed to the parish of St. John.

The argument for the plaintiff which was addressed to us by Mr. Jeune was a very subtle and ingenious one. He said this division had taken place under Orders in Council made in accordance with 6 & 7 Vict. c. 37, which is silent as to the position of sexton; that the statute provides, when an Order in Council is obtained for the constitution of separate parishes, with separate parochial officers of all sorts, for compensation for all with one exception of the case of the sexton; and, from the fact that the statute was silent on the subject of the sexton's position, and the further fact that no provision was made for compensation for loss of the sexton's fees where a parish was dismembered, he argued that the sexton remained unaffected by the statute or the Order in Council made under it, and would still continue to be entitled to the fees as if no dismemberment had taken place.

It was pointed out to Mr. Jeune in the course of the argument that the duties of a sexton are extremely important, largely affecting the feelings at any rate of the friends and relatives of deceased parishioners; and that it was hardly likely that the legislature should have intended that the sexton's position as regards the fees should remain unaffected while no provision was made for the discharge of his duties. Mr. Jeune said that possibly the former sexton might make an arrangement with the sexton of the new parish, or might appoint a deputy who in consideration of receiving part of the fee would perform all the

duties. But we cannot suppose that the legislature left so important a matter as the discharge of the sexton's duties to a chance arrangement of that sort. There is a further observation and it strikes me a stronger one against Mr. Jeune's argument. It would be very well to say that the silence of the statute on the subject afforded an inference that the position of the sexton was not meant to be affected, if the sexton's office was a sinecure, and if he were merely entitled to certain fees which were taken away from him, while no provision was made for his compensation: but the office is not a sinecure; the fees are an equivalent for services to be rendered; and the legislature might very well have been supposed, when a portion of the sexton's duties was taken away, —when a portion of the burden was removed,—that a corresponding benefit should also be taken away from him, and transferred to the new sexton. The legislature might have foreseen a probability that there would be a complete transfer of duty, and have intended that there should be a corresponding transfer of right to the fees.

For these reasons, it seems to us that the argument of Mr. Jeune fails; and, that being so, under the Order in Council the two parishes were properly constituted in their present area; that in that state of things the burial board was appointed; that the burial board became bound to divide the fees in accordance with the limits of the two parishes; and that therefore the plaintiff is not entitled to recover.

Another question was raised, as to the scale of fees. But, as was arranged in the course of the argument, we have treated the scale of fees put forward by the burial-board as a substitution for the former scale of fees; and therefore the plaintiff is not entitled to anything in respect of claims under the first scale not dealt with by the second scale. But, lest there should be any doubt about the question of fact, we have reserved to Mr. Jeune the right, if he should think fit, to apply hereafter to have the case sent back to have it further stated upon that point.

We give judgment for the defendants, with costs.

We have not gone through all the statutes referred to in the case. It was agreed on all hands that the division of the parishes took place under the statutes mentioned. We ought, perhaps,

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to have referred to 1 & 2 Vict. c. 106, but it does not appear to us to be needful for the purpose of this judgment.

Judgment for the defendants.

Solicitors for plaintiff: *Woodbridge & Sons.*

Solicitor for defendants: *A. Lawrence Houlder.*

J. S.

Nov. 27.

[IN THE COURT OF APPEAL.]

CHRISTOPHER AND ANOTHER *v.* CROLL.

Rules of Supreme Court, Order LVIII., rr. 1, 15—*Practice—Appeal—Time for appealing—"Bringing" of Appeal.*

At the trial of an action on the 23rd of June, 1884, judgment of nonsuit was given. The judgment was entered on the 2nd of July, 1884. The plaintiffs served a notice of appeal on the 22nd of June, 1885; the appeal was not entered till the 4th of July, 1885:—

Held, that the appeal was "brought" when the notice of appeal was served on the defendant, and that, as this was done within a year from the pronouncing of the judgment, the appeal was in time.

APPEAL by the plaintiffs from a judgment of nonsuit given by Hawkins, J., at the trial of the action on the 23rd of June, 1884.

The judgment was entered on the 2nd of July, 1884. The plaintiffs served a notice of appeal on the 22nd of June, 1885; the appeal was not entered till the 4th of July, 1885.

The plaintiffs in person.

J. G. Witt, for the defendant. The appeal is brought too late. It was not entered till after the expiration of a year, whether the time counts from the date of the pronouncing of the judgment or from the date of the entry of the judgment: Order LVIII., r. 15.

Mr. *Hinde*, one of the plaintiffs. The appeal was "brought" on the 22nd of June, 1885, when the notice of appeal was served: *Ex parte Viney* (1); *Ex parte Saffery.* (2)

LORD ESHER, M.R. Rule 1 of Order LVIII. says that "all appeals shall be brought by notice of motion," and rule 15

(1) 4 Ch. D. 794. (2) 5 Ch. D. 365.

provides that no appeal from a final judgment in an action shall be "brought" after the expiration of a year. This seems to shew that the appeal is "brought" when the notice of appeal is served on the respondent, and *Ex parte Viney* (1) and *Ex parte Saffery* (2) are decisions to that effect; so that, if the time counts from the 23rd of June, 1884, the notice of appeal was served within a year, and the appeal was "brought" in time.

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COTTON and BOWEN, L.JJ., concurred.

The appeal was then heard on its merits and was dismissed.

Solicitor for defendant: *John Tucker.*

W. L. C.

[IN THE COURT OF APPEAL.]

Nov. 3.

NIELSEN & CO. *v.* WAIT, JAMES & CO.

Ship—Demurrage—Charterparty—Lay Days—Usual Place of Discharge—Custom to lighten Vessel at Entrance to Port before proceeding to Place of Discharge.

By charterparty it was agreed that the plaintiffs' steamship should proceed to Cronstadt and load a cargo of wheat, and therewith proceed to a port in the English or Bristol Channel as ordered, "or so near thereto as she may safely get at all times of tide and always afloat, and deliver the same. Eight running days, Sundays excepted, to be allowed the merchants, if the ship be not sooner dispatched, for loading and discharging the steamer, and ten days on demurrage if required over and above the laying days at 25*l.* per day." The steamer arrived at Cronstadt, occupied six running days in loading a cargo of 4325 quarters of wheat, and was ordered to Gloucester, Bristol Channel, for discharge. She arrived at Sharpness Dock in the Bristol Channel on the 13th of November. Sharpness Dock is within the port of Gloucester, and about seventeen miles from the basin within the city of Gloucester, where grain cargoes are usually discharged if the burthen of the ship will admit. The steamer was ready to commence the discharge of her cargo on the 13th, but could not get nearer to Gloucester than Sharpness, until part of her cargo was first discharged at Sharpness. On the 14th and 15th of November the consignees discharged into lighters 1585 quarters of the cargo, and then required the master to take the steamer through the canal to a place of discharge within the basin at Gloucester. The master proceeded, and arrived in the basin on the 17th. On the 18th the residue of the cargo was discharged and the vessel returned to Sharpness, where she arrived on the 19th. In an action for demurrage evidence was given of a

(1) 4 Ch. D. 794. (2) 5 Ch. D. 365.

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custom of the port of Gloucester, according to which the usual place of discharging grain cargoes was at the basin within the city, and when vessels with grain cargoes destined for Gloucester were of too heavy a burthen to come up the canal they were lightened at Sharpness, and during the discharge at Sharpness of so much of the cargo as it was necessary to discharge in order to enable the vessel to proceed by the canal to Gloucester Basin the lay days counted, but the time occupied by coming up the canal to discharge at Gloucester Basin and by returning to Sharpness was not counted:—

Held, first, that the custom was reasonable; secondly, that it was not inconsistent with the express provision in the charterparty as to "running days," and that the time occupied by the vessel in going from Sharpness to the basin and in returning to Sharpness ought to be excluded from the lay days, and the plaintiffs were entitled to one day's demurrage only.

Brown v. *Johnson* (10 M. & W. 331; 11 L. J. (Ex.) 373) discussed.

Judgment of Pollock, B. (14 Q. B. D. 516) affirmed.

APPEAL of the plaintiffs from the judgment of Pollock, B.

The facts of the case are fully stated in the report of the judgment of Pollock, B. (1), and also may be gathered from the above head-note.

John Edge, and *Meek*, for the plaintiffs. In ascertaining the sum to be paid to the plaintiffs by reason of demurrage, they are entitled to take into account the two days occupied by the ship in proceeding along the Berkeley canal from Sharpness to the basin, and the one day occupied in returning. The phrase "running days" used in the charterparty means "consecutive days:" *Brown* v. *Johnson*. (2) The cases decided in Ireland, *Caffarini* v. *Walker* (3), and *McIntosh* v. *Sinclair* (4), which were cited by Pollock, B., at the end of his judgment, are inconsistent with his decision.

H. Matthews, *Q.C.*, and *A. T. Lawrence*, for the defendants, were not called upon to argue.

LORD ESHER, M.R. We have had the advantage of hearing from counsel all that possibly can be said, and I think that we have threshed out this case, and are in a position to give an opinion upon it without hearing the other side. The question is whether the shipowners in this case have under this charterparty

(1) 14 Q. B. D. 516.

(2) 10 M. & W. 331; 11 L. J. (Ex.) 373.

(3) Ir. Rep. 9 C. L. 431; Ir. Rep. 10 C. L. 250.

(4) Ir. Rep. 11 C. L. 456.

a right to charge the charterers or the consignees—it signifies not which—for two days, during which the ship was proceeding from a place called Sharpness along the canal to the basin of the Gloucester harbour which is in Gloucester, and also for one day whilst she was returning. That is the sole question. By the charterparty the ship was to load in a foreign port, and, being loaded with a grain cargo, was to proceed at the choice of the charterers to a good and safe port on the east coast of England, to London, or to a port in the English Channel, or in the Bristol Channel. She had to proceed to any of those at the charterers' order. Therefore until the order should be given, it could not be known to what port the ship was to go.

It seems to me to be undoubted that Gloucester is a port in the Bristol Channel. The first point that strikes me, is, how comes Gloucester to be a port in the Bristol Channel? Because it is upon a river that flows into the Bristol Channel. That is the reason why it is a Bristol Channel port. When there is such a large choice of ports as is given in this charterparty, nobody can tell the particular circumstances which the ship may have to meet, until the order is given to which port the ship is to go. What is the general rule governing the delivery of a cargo? The ship has to go to the port to which she is ordered; but to go to the port is not enough. She has to deliver her cargo at the port to which she is ordered, according to the usual course of delivery at that port of such a cargo as that which she carries. She cannot deliver the cargo at any portion of the port to which she is ordered, at the choice of her owners. They are not obliged to deliver the cargo at any part of the port to which she is ordered, according to the choice of the charterer. Her owners have undertaken to deliver at the port, and not at any particular part of the port at the whim and pleasure of the charterer, or at the whim and pleasure of the ship's owners. But by the construction that is put upon charterparties, her owners are bound, and entitled, to deliver at the port only in one part of the port, namely, at the usual place of delivery at that port of a cargo such as that which she carries. Under these circumstances I have not the slightest doubt that if it were shewn that for such cargoes as that which she carries, the usual mode of delivery of a ship was to unload

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her to one half or to any other proportion at one part of the port, and then, when she was lightened, to go on to another part of the port and there finish unloading, the usual place of delivery at that port would be at both those places. The usual place of delivering a cargo in such a port as that would be to go to the first place and there unload the ship, until she drew a particular draught of water, and then to go to the other place and finish unloading. In such a case as that, the owner of the ship would be bound, and entitled, to deliver the cargo from her in that way, unless some new stipulation had been made between him and the charterer as to the mode of unloading the ship.

Now I come to another clause which is commonly inserted in charterparties. There must be a stipulation as to the time to be occupied in the loading and in the unloading of the cargo. There must be a time, either expressly stipulated, or implied. If it is not expressly stipulated, then it is a reasonable time which is implied by the law; but either the law or the parties fix a time. Now, when they do fix a time, how do they fix it? Why, they allow a certain number of days, during which, although the ship is at the disposal of the charterer to load or to unload the cargo, he does not pay for the use of the ship. That is the meaning of "lay days." It is a stipulation always in favour of the charterer.

Now the days, which are given to the charterer in a charterparty, either to load or to unload without paying for the use of the ship, are "lay days." Other days are sometimes given also in favour of the charterer, which are called "demurrage days." Those are days beyond the lay days, but during which the amount that he has to pay for the use of the ship is a fixed sum, not necessarily what it costs the owner to keep his ship, but a fixed sum, which is usually about what it is supposed it costs the owner to keep the ship. This stipulation also is in favour of the charterer, because instead of being involved in a dispute as to what he would have to pay for the days during which the ship is kept idle, a sum is fixed, and he knows what he has to pay if he keeps the ship beyond the lay days. Those are the "demurrage days." If he keeps the ship beyond the lay days, when he pays nothing, and only the number of demurrage days, he pays a fixed sum for demurrage. If he keeps the ship after that, it is a

question of damages, and he does not know what he has to pay until the question is settled by a tribunal or by agreement.

We have here to deal with lay days. "Lay days" are described in a charterparty in various ways; sometimes certain days are fixed for loading or unloading. If these days are described simply as "days," then, although they are not so called when they are said to be for loading or unloading, nevertheless they are "lay days." "Days" and "lay days" are really the same in a charterparty. "Days" or "lay days" may be calculated in a different manner. They may be described, and sometimes they are described, in a charterparty as days of so many working hours. Then the number of days is fixed, but the length of each day is also fixed. The days may be described as "working days." Now "working days," if that term is used in the charterparty, will vary in different ports; "working days" in the port of London are not the same as working days in some other ports, even in England; but working days in England are not the same as working days in foreign ports, because working days in England, by the custom and habits of the English, if not by their law, do not include Sundays. In a foreign port working days may not include saints' days. If it is the custom or the rule of the foreign port that no work is to be done on the saints' days, then working days do not include saints' days. If by the custom of the port certain days in the year are holidays, so that no work is done in that port on those days, then working days do not include those holidays. Working days in an English charterparty, if there is nothing to shew a contrary intention, do not include Christmas Day and some other days, which are well known to be holidays. Therefore "working days" mean days on which, at the port, according to the custom of the port, work is done in loading and unloading ships, and the phrase does not include Sundays.

Merchants and shipowners have thought that this arrangement was not satisfactory to them, and that the lay days ought to be counted irrespectively of that custom, so that the charterer should take the risk whether work is done on Sundays or holidays at the ports. They, therefore, introduced a new term, which is "running days."

Now "running days" were put in really as a mode of compu-

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tation to be distinguished from "working days." "Days" were distinguished from "working days." "Days" include every day. If the word "days" is put into the charterparty—so many days for loading and unloading—and nothing more, that includes Sundays and it includes holidays. "Working days" are distinguished from "days." But I suppose and take it, that there might be another dispute as to what "days" would mean. If "days" are put in, there is sure to come some discussion about what is the length of the day during which the charterer is obliged to be ready to take delivery or the shipowner to deliver, because the length of days may vary according to the custom of the port. In some countries, for anything that I know, the custom of the ports may be to work only four hours a day, and if "days" are put into the charterparty, there may be a dispute —although I do not say it would be a valid contention according to English law—whether the day included more than four hours. And merchants and shipowners have invented this nautical term, about which there can be no dispute. They have invented the phrase "running days." It can be seen what it means. What is the run of the ship? how many days does it take a ship to run from the West Indies to England? that is the running of the ship. The run of a ship is a phrase well known. What are "running days?" It is a nautical phrase. "Running days" are those days, on which a ship in the ordinary course is running. It is true that when they are lay days, they do not take effect under the charterparty until the ship has done running; but the parties are describing the days about which they are talking, namely, days in a port, according to the phraseology which they use with regard to a ship at sea. "Running days" therefore mean the whole of every day when a ship is running. What is that? That is every day, day and night. There it is as plain as possible. They are the days, during which, if the ship were at sea, she would be running. That means every day. Now Lord Abinger, C.B., in *Brown* v. *Johnson* (1), pointed out that "days," inasmuch as they are working days, do in point of fact mean the same as "running days," because if so many days for loading and unloading are mentioned in a charterparty, not only working

(1) 10 M. & W. 331; 11 L. J. (Ex.) 373.

days are intended but every day, including Sundays and holidays. Therefore "running days" comprehend every day including Sundays and holidays, and "running days" and "days" are the same.

Having arrived at this conclusion, I must consider how are lay days—not "running days"—to be calculated. They must begin from the time, when the ship is at her berth in the usual place of delivery, where she can deliver. They must begin then, and they are to be counted, unless something appears to the contrary, consecutively. That is not because the phraseology says that they are consecutive, but because it is taken as a necessary implication of the meaning of both parties, that the moment the ship begins to unload they are to go on consecutively each day to unload her, and they must not either of them at their option take a holiday without the leave of the other. If "working days" are put in, on the face of it, in a manner, that consecutiveness is spoilt, because that phrase does not include Sundays. With "running days" or with "days" only there is nothing to take out the consecutiveness in the mere phraseology. In either of these cases the work must go on day after day consecutively. If in the charterparty it is provided that it shall be running days except Sundays, then upon the face of the charterparty the consecutiveness is spoilt, and although there are to be running days yet Sundays are excepted. What is the meaning of that? The meaning is that if the exception had not been put in, the phrase would have included Sundays, but by putting in the exception Sundays are taken out. That can be done in express language. Now comes the question, is the phraseology of "running days" contradicted by proof of a custom, which says that some intermediate days, such as Sundays, are at the port in question to be taken out? It does not seem to me that there is any contradiction. It is an explanation how the running days in that charterparty are to be worked, and they are not to be worked consecutively if the custom is contrary. I myself cannot see that that contradicts anything in the charterparty; and if it does not contradict it, then the custom may be proved. Here I think it cannot be denied that the custom was proved. The learned judge was satisfied with the evidence of the two witnesses, and

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he has found that the custom was proved. (1) What was that custom? That custom was not that every ship coming into Gloucester may at the option of either the shipowner or the charterer discharge her cargo at Sharpness: that is not the custom proved: therefore the custom is of a very limited kind, and it amounts merely to this, that if a ship arrives at the port of Gloucester with a grain cargo—so far as the evidence of custom in this case goes, it applies only to grain ships—or if she arrives at Sharpness so heavily loaded and brought down so much in the water that she cannot pass up the canal with that cargo on board, the shipowner has a right to call upon the charterer to be present at Sharpness and to take delivery of so much of the cargo—not any part which the charterer agrees to take, or orders to be unloaded, or which the shipowner thinks fit to unload—as will lighten the ship so as to enable her to go up the canal. The time occupied in unloading at Sharpness is to count as part of the lay days. The custom itself seems to me to assume that Sharpness is in the port of Gloucester, because if the unloading at Sharpness were a lightening of the ship outside the port of Gloucester, the shipowner would not be entitled to say that the time occupied is part of the lay days. To my mind it shews that Sharpness, for this purpose at all events, is to be considered within the port of Gloucester. But I care not whether it is or not. If it is not within the port of Gloucester, it is obvious to my mind that the shipowner would not be entitled to count the time spent in unloading as lay days; and if it is without the port of Gloucester, it seems to be impossible to say that the defendants are liable. But I myself treat, at all events for the purposes of this case, Sharpness as being within the port. Then what does the custom come to? It seems to me that within the port of Gloucester for a ship laden with a grain cargo there are two places of discharge. The ship begins to discharge so far as is necessary to lighten her to enable her to go up the canal at Sharpness. She then goes up to the basin and finishes the discharge. Therefore there is a double discharge, it taking place partly in one place and partly in another. If there was no custom, the lay days would commence at the beginning of the

(1) See 14 Q. B. D. 520.

delivery at Sharpness, and would go on consecutively. Therefore the shipowner would have been entitled to demurrage from arriving at Sharpness. But the custom adds this term, namely, that for the intermediate traversing of the canal in the same port, between the two places of delivery within the same port, although the running days are to be consecutive, part of them is to be cut out, and they are to be resumed when the ship arrives in the basin. I do not think that that custom contradicts anything. It seems to me that it cannot be objected to on the ground, that it contradicts the charterparty. So far from its being an unreasonable custom, it seems to me to be most reasonable, both with regard to the charterer and also with regard to the shipowner, and to do accurate justice between them having regard to the circumstances of the port.

Therefore I think that the judgment of the learned judge was right; and that this appeal ought to be dismissed with costs. So far am I from thinking that Lord Abinger's judgment in *Brown* v. *Johnson* (1) is contrary to the view which I have taken, that it seems to me to be an express authority that such a custom as this is admissible, and that if it is proved to exist in point of fact it modifies the charterparty.

COTTON, L.J. I am of the same opinion. By the custom, found by the learned judge to be proved on the evidence, when vessels are coming to the place of discharge at Gloucester, but are too heavily laden to come up the canal, they discharge at Sharpness so much of the cargo as is necessary to lighten them in order to enable them to go up the canal; and the days employed in lightening the vessel, and in discharging part of the cargo, are counted as part of the lay days provided for by the charterparty, and they are interrupted during the time that the vessel takes in going up the canal, and begin again when the vessel arrives at the ordinary place of discharge at Gloucester. That is, in my opinion, what the learned judge has found to be the custom.

It is said that the custom really was not proved, because the evidence went, not to establish it, but to establish something very different, and something that was so wide as to be bad. In my

(1) 10 M. & W. 331; 11 L. J. (Ex.) 373.

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opinion that is not the result of the evidence. It is very true that upon cross-examination the witnesses do state that they understand the rights of parties under a charterparty to be extremely wide; but I do not at all understand them as saying that that was the custom upon which they relied, but simply that according to their view of what were the rights of the parties under charterparties, certain results would follow. In my opinion nothing in that cross-examination would justify us in saying, that the learned judge was wrong in finding, that the custom was such as he has stated. It seems to me a reasonable custom. At a place within the port of Gloucester, where there is an entrance to the canal, vessels too heavily laden must be lightened in order to get up to the customary place of discharge. It seems to be most reasonable in the interests, both of the shipowner and of the merchant, that the vessel, if she is to be lightened, should be lightened at Sharpness, the time then employed being counted as part of the lay days provided for, and the passage up the canal not being included in the lay days; but that when the vessel arrives in the basin, the lay days should be considered as beginning again, and that the time spent at Sharpness should be taken into consideration in ascertaining whether the days provided for in the charterparty have or have not been exceeded.

This objection also was taken, and of course if it could be made out it would be fatal. It was said that this mode of counting was contrary to the provisions of this charterparty, and there I think lay a fallacy. When a custom is introduced, it is intended to control that which in the absence of custom would be the consequences of the contract entered into between the parties. The object is to supply that which is not expressly stipulated for in the contract between the parties, and to interfere with what would be their legal rights, there being no express provision in the charterparty or in the contract with reference to the matter; but unless the custom does interfere with the express provisions of the contract, there is no reason why it should not be applied, for then it simply discharges its duty of dealing with that which the parties have not in express terms themselves provided for. How is the custom said to be contrary to the express provisions of this charterparty? It is said that eight running days are provided for

taking on board a cargo and discharging the cargo, and also, it must be remembered, for any delay which there might be at Elsinore in giving an order to the master of the vessel. It is said that the "running days" mean "consecutive days." There is the fallacy of the argument. The meaning may be this, that in the absence of any custom the days of unloading would be consecutive; but what we have to consider is whether the stipulation that there are to be eight running days instead of only eight days, is an express term that the days for unloading shall be consecutive. In my opinion that is not the meaning of "running days." It is not ordinary English to say that "running days" mean "consecutive days." "Eight days running" would have borne the meaning, I think, of "consecutive days"; but "running days" are very different, and in my opinion nothing that has been quoted before us shews that the words "running days" in the English language mean necessarily "consecutive days." That may be the consequence; but it is the consequence only in the absence of any custom, because in the absence of an express stipulation, when the unloading once begins, it is the duty of the charterer to carry that on without a break, except so far as the law or custom requires that there shall be a break. What was said by Lord Abinger, C.B., in *Brown* v. *Johnson* (1), was, I think, principally relied upon, but, in my opinion, what he says is contrary to the appellants' contention. What he said is this: "With respect to the days, I think the word 'days' and 'running days' mean the same thing, namely, consecutive days, unless there be some particular custom." He says that "days" mean days of a particular kind. But he cannot mean that they are the same as if "consecutive days" were expressly stipulated for. Then he says, both as regards days and running days, that they mean consecutive days, unless there be some particular custom. If "running" was identical with "consecutive," no custom could interfere in order to make the days not consecutive, which to my mind clearly shews that the term "running" is not the same as another term for "consecutive," but merely that the consequence of the stipulation of so many days or so many running days will be that they are in the absence of custom to be consecutive, that is, that the work is to be carried on without a break. That being

(1) 10 M. & W. 331; 11 L. J. (Ex.) 373.

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so, there is nothing in the express terms of this contract to prevent the custom from being introduced, and as it is introduced, in my opinion the judgment of the learned judge was quite right, that the days for going up the canal and coming back are not to be included in counting the lay days allowed for the discharge of the cargo; and in my opinion this appeal fails.

LINDLEY, L.J. I am of the same opinion. I also think that upon the evidence the custom relied upon was proved. I need not go through the evidence again, because that has been done already. Then comes the main point urged by the plaintiffs' counsel, that even although the custom has been proved, it is inconsistent with the terms of the charterparty, and cannot affect the question in dispute between these parties. His argument, when it has been sifted and reduced to the smallest possible compass, is that "running days" in this charterparty ought to be read as "consecutive days." Just let me analyse that argument. In the first place, if the word "consecutive" is substituted for the word "running," the charterparty is made wholly insensible. It would follow that the time spent in loading and unloading and at Elsinore in calling for orders are all to be consecutive days. That cannot be. That shews that the one word cannot be substituted for the other. But then it was urged that although the word "consecutive" is not used, yet "running days" have been held to mean "consecutive days." Let me examine that proposition and see how the custom bears upon it. The stipulation in the charterparty is that eight days are to be allowed for loading and discharging, and the custom, as I understand the evidence, appears to come to this, that the time which is necessarily consumed in going up the canal and back again, is not treated as part of the time allowed for unloading. If the question is looked at in that way, the custom, instead of contradicting the charterparty, is in strict conformity with it. What is the discharge of a cargo? Is the cargo being discharged when the ship is going up and coming down the canal? As a physical fact it is not. Is the time consumed in going up and coming down the canal, time consumed in discharging the cargo? The custom of the port says that it is not, and the custom seems to be in complete conformity with the

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charterparty, instead of contradicting it. I need not say more about the authorities. It may be that the word "days" is ambiguous, and may mean "working days," or "non-working days," but "running days," mean all days, whether they are working days or non-working days. There is always great danger in substituting one word for another, or in supposing that they bear the same meaning.

It appears to me, for these reasons, that the decision of the learned Baron was quite right, and that the appeal ought to be dismissed with costs.

Judgment affirmed.

Solicitors for plaintiffs: *Turnbull, Tilly, & Mousir, for Turnbull & Tilly, West Hartlepool.*

Solicitors for defendants: *Edward Doyle & Sons, for Taynton & Sons, Gloucester.*

J. E. H.

[IN THE COURT OF APPEAL.]

Nov. 17.

MOGG *v.* CLARK.

Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 6, 54—*Vestryman—Qualification—Rating—Assessment—Occupation—Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 3—*Agreement by Owner with Overseers to pay Rates instead of Occupiers.*

An agreement by the owner of small tenements with the overseers of the parish to pay the poor-rates instead of the occupiers, his tenants, (made under the Poor Rate Assessment and Collection Act, 1869, s. 3), does not render him a "person rated or assessed to the relief of the poor" within the meaning of s. 6 of the Metropolis Management Act, 1855, and does not qualify him to act as a member of a vestry constituted under the latter statute; and if he acts as a member, he will be liable to the penalty imposed by s. 54.

Quære, whether in order to be capable of acting or being elected as a vestryman under s. 6 of the Metropolis Management Act, 1855, a person must be rated and assessed in respect of the same hereditaments of which he is occupier.

Judgment of Lopes, J. (15 Q. B. D. 82), affirmed.

THIS was an action brought to recover penalties under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 54, the plaintiff alleging that the defendant had on two occasions acted as a member of the vestry of the parish of St. Leonards,

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Shoreditch, without being qualified by rating and occupation as is required by s. 6 of that statute.

At the trial before Lopes, J., without a jury, it appeared that the defendant occupied a garden, which was jointly rated with a house let to another man at 18*l.*: the defendant occupied nothing else within the parish: he was the owner of several small tenements, which were rented by tenants whose names appeared in the rate-book as occupiers. The defendant had agreed with the overseers under s. 3 of the Poor Rate Assessment and Collection Act, 1869, to be liable for the poor-rates assessed in respect of these tenements. The aggregate rental of these tenements was 68*l.*, and so appeared in the rate-books. In the parish of St. Leonards, Shoreditch, a resolution had been passed in the year 1869 as to the rating of owners under the Poor Rate Assessment and Collection Act, 1869, s. 4. This resolution was rescinded in 1872. Since that year agreements had sometimes been entered into with owners to pay the rates instead of the occupiers.

Upon these facts Lopes, J., had given judgment for the plaintiff for two penalties of 100*l.* (1)

The defendant appealed.

Arthur Charles, *Q.C.*, and *Winch*, for the defendant. It must be admitted that the defendant was not rated, but the agreement with the overseers to pay the rates was equivalent to a rating of the owner, and therefore the defendant was qualified by rating, and was entitled to be elected and to act as member of the vestry: *Reg.* v. *Hampton* (2). "Rating" is made on the person: "assessment" refers to the property. If the defendant does not fulfil his agreement, his goods and chattels may be distrained upon and sold under s. 11 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41).

[COTTON, L.J. Sect. 7 of that statute seems to shew that the occupier, and not the owner, is qualified to be elected, when an agreement is entered into under s. 3.]

The view which is now contended for on behalf of the defendant, was not raised in *Goodhew* v. *Williams* (3), which, therefore, is not an authority against him.

(1) 15 Q. B. D. 82. (2) 6 B. & S. 923. (3) 3 C. P. D. 382.

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W. Grantham, Q.C., and *Bucknill, Q.C.*, for the plaintiff, were not called upon to argue.

LORD ESHER, M.R. This is an action by an informer upon s. 54 of the Metropolis Management Act, 1855. The allegation is that the defendant has acted as member of a vestry without being qualified by rating and occupation, as is required by that statute. The defendant has occupied a garden, and he contends that he has had a sufficient "occupation" within the meaning of the statute; but I do not propose to deal with the question, whether his occupation has been such as was intended by the legislature. For the plaintiff it is said that the defendant is not rated; but the defendant contends that there has been an assessment upon him in respect of that which he has undertaken to pay, and that this is equivalent to rating. What has taken place in this parish to secure the payment of poor-rates in respect of small tenements, has been regulated by the Poor Rate Assessment and Collection Act, 1869. In that statute occur two sections, under which the inhabitants of the parish have been dealt with. By s. 4, the owners of all small tenements may be rated to the poor by order of the vestry, and then, by sub-s. 1, "the overseers shall rate the owners instead of the occupiers." In this parish the vestry had passed an order rating the owners of the small tenements; but afterwards the vestry rescinded the order, as they were empowered to do by sub-s. 3, and then the transaction, material to the present action, took place between the overseers and the defendant. The position of affairs is the same as if the vestry had never made an order to rate the inhabitants. The important enactment is s. 3, whereby it is enacted that in case the owner of a small tenement "is willing to enter into an agreement in writing with the overseers to become liable to them for the poor-rates assessed in respect of such hereditament . . . . the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him." Under this enactment the owner does not seem to be "assessed": he only agrees with the overseers to pay the amount of the rate. The defendant has entered into an agreement of this kind. Then by s. 6 of the Metropolis Management Act, 1855, the vestry

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elected under that Act is to "consist of persons rated or assessed to the relief of the poor." Perhaps a person can be "assessed" without being "rated"; but if he acts as a member of a vestry, he will be within the penal clause of s. 54, although he is assessed, unless he is also rated. The words "rated" and "assessed" both apply to the person and to nothing else. But is it possible to be "rated" without being "assessed"? The overseers assess the amount of the rate for the whole parish, that is, they consider what is the amount wanted for the whole parish: this they "assess." Then they fix the amount to be paid by each occupier, so that he also is "assessed." He is afterwards put into the rate book, and then he may be said to be "rated." He cannot be "rated" until he is "assessed," he cannot be "rated" without being "assessed." Although there may be different processes, yet it is one operation. The words of s. 6 of the Metropolis Management Act, 1855, are "rated or assessed"; but I think that they mean "rated and assessed." Then by s. 54 the penalty is imposed on a person who acts as a member of a vestry "without being qualified by rating." As I have pointed out, a person cannot be rated without being assessed, and therefore he is not to act as a member of a vestry unless he is both "rated and assessed." That is sufficient to dispose of this case, because the defendant merely made an agreement with the overseers, and admittedly was not rated.

It was held also by Lopes, J., that a person who acts as a member of a vestry will be liable to the penalty imposed by s. 54, unless the hereditaments in respect of which he is rated and assessed are also in his occupation. In the view which we take, it is not material for us to decide this point, and it is unnecessary for us to determine whether apart from s. 3 of the Poor Rate and Assessment Collection Act, 1869, the defendant would be liable to penalties.

COTTON, L.J. This is an action brought under s. 54 of the Metropolis Management Act, 1855, against a person who is alleged to have acted as a member of a vestry without being qualified by rating and occupation. In s. 6 the qualification is stated to be rating or assessment. The mention of both kinds

of qualification throws light upon the construction of the Act, and supports the view of the Master of the Rolls, that rating and assessment must go together. I need not refer at length to the sections of the Poor Rate Assessment and Collection Act, 1869: the Master of the Rolls has dealt with the more important of them. Although the provisions of s. 3 may be put in force, nevertheless the occupier continues to be the person rated: there is simply an agreement between the overseers and the owner, and the latter becomes liable to pay the rates, which may be levied on his goods and may be recovered from him in the same way as poor-rates may be recovered from the occupier (s. 11); but if the rates remain unpaid by the owner, the goods and chattels of the occupier are liable to be distrained and sold (s. 12). The statute itself directs that the occupier shall be deemed to be duly rated (s. 19). It is said that a distinction exists between "assessment" and "rating," and in the title of the Poor Rate Assessment and Collection Act, 1869, "the rating of occupiers" is mentioned; in the preamble "the collection of poor rates assessed upon occupiers of hereditaments" is alluded to, and in many of the sections of the Act the rates are said to be "assessed" on or in respect of the hereditaments. But by s. 6 of the Metropolis Management Act, 1855, the vestry is to consist of "persons rated or assessed to the relief of the poor"; and we cannot depart from the obvious meaning of the legislature, namely, that the members of a vestry must be rated. The defendant is neither assessed nor rated; he has only entered into an agreement to pay the rates.

I express no opinion whether the occupation by the defendant is sufficient: I express no opinion in favour of the view that it is.

LINDLEY, L.J. I also think that Lopes, J., was right in the conclusion at which he has arrived. I follow the argument that property is "assessed," and that a person is "rated"; and I am struck with the circumstance, that in the Metropolis Management Act, 1855, s. 54, the word "assessed" is struck out; but it is impossible to say that the defendant is "rated" within the meaning of the statute, and it appears to me that unfortunately he has incurred the penalties. I am fortified in the conclusion

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at which I have arrived, by a reference to the Small Tenements Act (13 & 14 Vict. c. 99). By s. 6 of that statute "every such owner so rated as aforesaid shall have the same right of appeal (subject to the same conditions) against rates, and the same right to vote in vestry, as if he were an occupier duly rated in respect of the same tenement." A similar right of appeal is given to the owner by s. 13 of the Poor Rate Assessment and Collection Act, 1869; but I can find no section in this statute conferring upon the owner the right to vote as if he were an occupier; and on the contrary, ss. 7 and 19 seem inconsistent with it. The whole of the Small Tenements Act (13 & 14 Vict. c. 99) has been repealed by the Poor Rate Assessment and Collection Act, 1869, s. 6, and by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66); and I feel pressed by the consideration that there is now no enactment enabling an owner, who is rated instead of the occupier, to vote in the vestry. I think that the judgment of Lopes, J., was right, and that this appeal must be dismissed.

Judgment affirmed.

Solicitors for plaintiff: *Bramall & White.*
Solicitors for defendant: *F. R. Smith & Son.*

J. E. H.

[IN THE COURT OF APPEAL.]

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Nov. 21.

RICHARDSON *v.* HARRISON AND ANOTHER.

Will—Estate in Realty—Rule in Shelley's Case — Legal Estate—Equitable Estate—Devise to Trustees—Will made before the 1st of January, 1838—*Quantity of Estate taken by Trustees—Discretionary Authority to sell—Tenant for Life with Power to appoint to Children—Ultimate Limitation to Right Heirs of Tenant for Life—"In default of such Appointment"—Remainder—Executory Devise.*

By a will made in the year 1833 a testatrix devised a freehold messuage unto trustees, their heirs and assigns, upon trust for her daughter during her life, and after her decease upon such trusts for the lawful child or children of the daughter as she should by deed or will appoint, and "in default of such appointment" in trust for the daughter's right heirs. The testatrix directed that the receipts of her daughter should be a discharge to the trustees, that the messuage should be enjoyed by her daughter free from the debts, control, or engagements, of any husband with whom she might intermarry, and that the trustees might reimburse themselves. The testatrix authorized the trustees, their heirs or assigns, also to sell the messuage with the consent of her daughter "or other the persons or person who shall be beneficially interested under the trusts." The daughter after her mother's death granted the messuage to the defendants in fee simple, and died without having been married. The plaintiff, her heir-at-law, having brought an action to recover the messuage:—

Held, that the messuage was devised to the trustees in fee simple at law; that the limitation to the right heirs of the daughter in default of an appointment to her children was a remainder and not an executory devise; that both the estate for life devised to the daughter and the remainder to her right heirs were equitable estates; that consequently the estate for life and the remainder to the right heirs coalesced pursuant to the rule in *Shelley's Case* (1 Rep. 93 b), that the daughter could make a valid disposition of the fee simple, and that the defendants were entitled to the messuage.

By Cotton, L.J., *Cunliffe* v. *Brancker* (3 Ch. D. 393) and *In re Hart's Estate* (W. N. 1883, p. 164) distinguished.

A power given by will to a tenant for life to appoint to his children, with an express limitation over "in default of such appointment," cannot be construed as conferring upon the children any estate or interest in default of the exercise of the power of appointment, at least in the absence of provisions extending the operation of the power.

By Lord Esher, M.R., *In re Jefferys' Trusts* (Law Rep. 14 Eq. 136) dissented from as to this point.

By Cotton, L.J., *Bradley* v. *Cartwright* (Law Rep. 2 C. P. 511) explained and distinguished.

ACTION to recover a house, shop, and premises.

Elizabeth Hayley, of Carshalton, in the county of Surrey, widow,

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by her will dated the 9th of July, 1833, made the following dispositions of her real and personal property:—

"I give and devise unto J. Treacher . . . and G. Rattcliff . . . their heirs and assigns, all that my freehold messuage or tenement with the appurtenances situate in Carshalton . . . now in the joint occupation of myself and B. Marfleet, to have and to hold to them, the said J. Treacher and G. Rattcliff, their heirs and assigns; upon trust nevertheless for my daughter Eliza Hayley and her assigns during her natural life, and after her decease upon such trusts for the lawful child or children of the said Eliza Hayley as she shall by any deed or instrument in writing duly executed and attested, or by her last will and testament, whether covert or sole, and if covert, notwithstanding her coverture, appoint, and in default of such appointment, in trust for her right heirs for ever. I give and devise unto the said J. Treacher and G. Rattcliff, their heirs and assigns, all those my copyhold lands, messuages, hereditaments, and premises (which I intend to surrender to the use of my will,) situate, lying and being in the parish of Carshalton aforesaid, and now in the several tenures or occupations of E. Bailey, C. Edwards, T. Coltsworth, and J. Michael, to have and to hold the said lands, messuages, hereditaments, and premises unto the said J. Treacher and G. Rattcliff, their heirs and assigns, according to the custom of the manor of which the same are now holden; upon trust nevertheless for my daughter Catherine Hayley and her assigns during her natural life, and after her decease upon such trusts for the lawful child or children of the said Catherine Hayley as she shall by deed or will as aforesaid, whether covert or sole, appoint, and in default of such appointment, in trust for her right heirs for ever. And as to, for, and concerning all those my four cottages situate in West Lane, Carshalton, aforesaid, and also all those two messuages or tenements and two crofts of land in the town and parish of Newport, in the county of Salop, now in the several tenures or occupations of T. Brown, G. Ward, and J. Rylands, Esq.; and as to all the rest and residue of my hereditaments and real estate whatsoever and wheresoever, I give and devise the same unto the said J. Treacher and G. Rattcliff, their heirs and assigns, upon the trusts following; that is to say, upon trust during the joint lives

of my said two daughters, Eliza Hayley and Catherine Hayley, to receive the rents, issues, and profits thereof, and pay and apply the same as the same shall be so received unto and to the use of the said Eliza and Catherine for their sole and separate use in equal shares and proportions as tenants in common, and after the decease of either of my said daughters leaving issue, then upon trust to pay and apply the rents, issues and profits of one moiety of the last mentioned hereditaments unto and to the use of the survivor during her life, and to convey or stand seised of the other moiety of the said hereditaments and residuary estate unto and to the use of such child or children of my said daughter so dying, in such manner as she shall, whether covert or sole, by deed or will, appoint, and in default of such appointment in trust to convey the said moiety to such child, if but one, or to the children, if more than one, of such deceased daughter as tenants in common; and if either of my said daughters shall die without leaving issue, then upon trust to receive and pay or apply the whole of the rents, issues, and profits of the last mentioned hereditaments unto or to the use of the survivor during her life, and after her decease upon trust to convey or stand seised of the whole of the last mentioned hereditaments unto or to the use of the child or children of the survivor in such manner as such survivor, whether covert or sole, shall by deed or will to be executed as aforesaid appoint; and in default of such appointment upon trust to convey the same to such child if but one, and if more than one, to the children of such survivor as tenants in common; and should both my said daughters die without issue, then in trust for such person or persons for such estate and estates and in such manner, shares and proportions as the survivor of my said daughter shall, by her last will and testament, appoint; and in default of such appointment, in trust for the right heirs of the survivor of my said daughters for ever. And I hereby direct that the receipt and receipts of my said two daughters, whether covert or sole, and if covert, notwithstanding such coverture, shall be a good and sufficient discharge and discharges to my said trustees, their heirs and assigns, for all moneys, payable to my said daughters, or either of them under the aforesaid trusts, and that they shall enjoy the several estates and interests hereby

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devised in trust for them absolutely, freed from the debts, control, or engagements of any husbands or husband, with whom they or either of them may intermarry. And my will is, and I hereby direct that it shall be lawful for my trustees, or the survivor, or the heirs or assigns of such survivor, by and with the consent in writing of my said daughters, or the survivor, or other the persons, or person, who shall from time to time be beneficially interested under the trusts aforesaid in the whole or any of the freehold and copyhold estates and hereditaments comprised in and devised by this my will, to make sale, exchange, or otherwise at their discretion dispose of the whole or any part or parts thereof, and to invest the proceeds thereof, if sold, either in the purchase of other estates, or in the public funds, or upon good freehold security, and hold the same, as also such lands as may be received in exchange for any part thereof, upon the same trusts, as the said estates so to be disposed of were originally held upon by virtue of this my will. I direct that my said trustees and the survivor, his heirs and assigns, shall not be answerable or accountable, one for the other, nor for involuntary losses, but each for his own acts and wilful defaults only; and also that they may reimburse themselves all costs, charges, damages, and expenses, which they or either of them may be put to in the execution of the trusts hereby in them reposed. I give and bequeath all my personal estate of what nature or kind soever, and wheresoever the same may be, unto my said two daughters, Eliza Hayley and Catherine Hayley, in equal shares and proportions as tenants in common. And I appoint the said J. Treacher, G. Rattcliff, Eliza Hayley, and Catherine Hayley, executors of this my will."

The freehold messuage or tenement with the appurtenances situate at Carshalton, in the will mentioned, were the hereditaments of which the plaintiff sought to recover possession in the action.

The testatrix, Elizabeth Hayley, died on the 30th of March, 1834, and her will was duly proved in the Prerogative Court of Canterbury by J. Treacher and G. Rattcliff.

Elizabeth Hayley was the widow of William Hayley, who died in March, 1829. Elizabeth and William Hayley had two children only, Eliza Hayley and Catherine Hayley. Eliza Hayley died on

or about the 12th of May, 1880, having never been married. Catherine Hayley married John Richardson, and died on the 16th of October, 1845. John Richardson died before Eliza Hayley. The plaintiff, William Henry Richardson, was the eldest child of John and Catherine Richardson who was living at the death of Eliza Hayley. The writ of summons in the present action was issued on the 17th of June, 1882. Before Eliza Hayley's death Alfred Marfleet had entered into possession of the freehold messuage or tenement with the appurtenances thereof, which comprised a grocer's shop and house adjoining, situate at Carshalton. The action was originally commenced against Alfred Marfleet, he being then in possession of the freehold messuage or tenement and appurtenances. By an order made in the action the present defendants obtained leave to appear and defend, and were substituted as defendants in the place of Alfred Marfleet.

The nature of the defendants' title may be shortly stated as follows:—

In March, 1858, Eliza Hayley mortgaged the house, shop, and premises, to Edward Long to secure an advance of 600*l.* and interest. In August, 1866, Long was paid the sum of 600*l.* and interest thereon by Messrs. Brady, Dorman & Dorman, at the request of Eliza Hayley, and Long and Eliza Hayley conveyed the house, shop, and premises, to Messrs. Brady, Dorman & Dorman, to secure the sum of 1000*l.* and interest thereon, such sum consisting of the above-mentioned sum of 600*l.* and a further sum of 400*l.*, which was advanced by them to Eliza Hayley. The defendants and one Wrigley, since deceased, as trustees of the marriage settlement of the defendant, Robert Harrison, and Miss Wrigley, advanced to Eliza Hayley out of trust funds the subject-matter of the said settlement, a sum sufficient to pay off the mortgage of Messrs. Brady, Dorman & Dorman, which was paid off accordingly. By a deed executed by Eliza Hayley, the defendants, and the said Wrigley, bearing date the 5th of March, 1873, after reciting the mortgages hereinbefore mentioned, and that it had been agreed by and between the said parties for the absolute sale by Eliza Hayley to the other parties of the hereditaments intended to be thereby assured and the inheritance thereof in fee simple in possession free from all incumbrances, Eliza

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Hayley for the considerations in the said deed mentioned granted to the defendants or the survivors of them the said shop, house, and premises by the said deed assured or expressed so to be unto and to the use of them, their heirs and assigns, for ever by way of absolute sale, as aforesaid. The said Wrigley died in or about the year 1879.

These facts having in substance appeared upon the pleadings, the plaintiff, by his reply, objected that under the will of Elizabeth Hayley, Eliza Hayley having never been married, had nothing more than a life estate in the said shop, house, and premises, and could not dispose of the same for any period beyond her own life.

A master at Chambers ordered that the point of law, raised by the plaintiff in his reply, should be set down for hearing and disposed of forthwith, and before the trial of the issues of fact in the action.

The point of law, raised by the plaintiff in his reply, accordingly came on for argument in the Queen's Bench Division, before Manisty and Wills, JJ., and on the 2nd of June, 1885, the following judgments were delivered:—

MANISTY, J. This case has been extremely well argued before us on both sides, and the conclusion, at which I have arrived, is, that the plaintiff is entitled to our judgment.

The plaintiff claims as right heir of the daughter of the testatrix, Elizabeth Hayley; the defendants claim under the daughter of Elizabeth Hayley, Eliza Hayley; and the question is, what is the true construction of the will of Elizabeth Hayley? As I understand, the action is brought to recover the freehold property in Carshalton. The will gives rise to several questions which are not altogether free from doubt; but if there was more doubt in my mind than there is with regard to the construction to be put upon this will, I think that we are concluded by the decision of Kay, J., in *Orford* v. *Hart* (1), which has been brought to our attention. I do not wish to have it supposed that I think that decision erroneous. I confess that I have come to the conclusion that it is correct, and that our judgment should be for the

(1) W. N. 1883, p. 164.

plaintiff. I think, speaking for myself, that we are giving effect to what clearly was the intention of the testatrix, Elizabeth Hayley. Of course I must call it her intention, and we must call the language of her will her language; but we know that this expression is not always correct, because certain rules of law and certain decisions have settled the law with respect to limitations and provisions in a will. Now suppose this case to come before us free from technicality and even from settled rules of law, what would be the conclusion to which we ought to come? Would it be that Elizabeth Hayley or her advisers who prepared the will intended that this property should go, not to Eliza Hayley's right heir, but to a grantee from her, and that the daughter Eliza might deal with the property as absolute owner? Did the testatrix mean that the right heir of her daughter Eliza Hayley should be excluded by any disposition which she might make, other than that which is provided for in the preceding clause of the will, namely, that if Eliza Hayley had children, she might appoint the property to those children and dispose of it to them? Now let me just read, and then see what the result would be according to one's common sense, and according to the ordinary notion of those, who read simply with the common-sense view and with ideas, which the clause itself would present to the mind. Elizabeth Hayley had two daughters, Eliza and Catherine, and by the first clause in the will she makes a provision for Eliza in these terms: she gives this freehold property in Carshalton to two persons, Treacher and Rattcliff, their heirs and assigns, upon trust for the testatrix's daughter Eliza Hayley and her assigns during her natural life—that is all which she intends her daughter to have—and after her decease upon such trusts for the lawful child or children of the said Eliza Hayley as she should by any deed or instrument in writing duly executed and attested, or by her last will and testament, whether covert or sole, and if covert notwithstanding her coverture, appoint. That is all very natural; she gives it to her daughter for her life, with a power to appoint it among her children. And in default of such appointment it is to be held in trust for the said Eliza Hayley's right heirs for ever. Eliza Hayley's right heir happens to be the plaintiff. I suppose on reading it any ordinary person would say that that is what the

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testatrix meant to say: "if my daughter has no children, if she does not make any appointment, if she has no children to whom to make an appointment, it shall go to her right heir; I do not mean her to have the power of disposing of it: I mean it to go to her right heir." But then it is said that by the rules of law and by decided cases that is not so, it is not to go to Eliza Hayley's right heir; but Eliza Hayley, owing to the rule in *Shelley's Case* (1), might convey that property away, and might deal with it as her own, as in fact she did. One would think as an ordinary person, and without the knowledge of the rule in *Shelley's Case* (1), or the rule in any other case, that what she meant was what she said: "I mean this property to go to Eliza Hayley's right heir if she dies without children; I give it to her for life; I give power to her to appoint it amongst her children; but if she dies without children, then it is to go to Eliza Hayley's right heir." Of course if Eliza Hayley had had a son, he would have been the right heir. If Eliza Hayley had had daughters and no son, they would have been the heirs in co-parcenery. I should have thought, but for the legal refinements with which we have to deal, that it would have been a very plain and simple will.

Now I pass over the next clause to Catherine Hayley, and I come to a very important clause, that the daughters "shall enjoy the several estates and interests hereby devised in trust for them absolutely, freed from the debts, control, or engagements of any husband or husbands, with whom they or either of them may intermarry." In construing a will we must look to the whole will, and it is not denied by the defendants' counsel, and I am sure he would not for a moment deny it, that that is a sound and settled rule of construction. But it is said that we must look at these as two clauses, and that if the two are read together, greater weight ought to be given to his construction than to the construction urged by the plaintiff's counsel. Now, if the two clauses are construed together, then it comes to this, that the provision that the daughters are to enjoy the property in trust free from the debts, control, or engagements of any husband or husbands with whom they may intermarry, means this, that it is a devise to Eliza Hayley for her natural life for her separate use free from the

(1) 1 Rep. 93 b.

control of her husband, and if it is read in that way, (apart from the ingenious but refined argument of the defendants' counsel,) we can see then on which side the balance of the evidence is as to intention. Now, that argument is an extremely difficult and, I should think, almost impossible mode of dealing with the case. In my view the will must be read just as if this clause, for what I may call separate use, had been inserted in the former clause. If so, then the ground which the defendants' counsel takes is, I think, cut from under him, namely, that being in the will, but in a separate place, it is to have a different construction put upon it, and a different effect given to it, than if it were in the clause of gift, because, if it were in the clause of gift, then the case is undistinguishable from the case of *Orford* v. *Hart* (1), decided by my Brother Kay. Why should we give more weight or less weight according as we find the clause as to separate estate inside or outside the clause of gift? It must be borne in mind that this clause, with which we are dealing now about the separate estate, follows, in addition to the first, upon two other clauses, and two other sets of devises. Suppose that it had come after the second clause, namely, after the devise to Catherine and her children, could any one doubt that an experienced conveyancer and draughtsman preparing a will of that sort would say: "What is the use of repeating it: I am here first devising property to Eliza Hayley and then to Catherine Hayley, and then I put in one clause applicable to both, namely, that it is to be for their separate use?" I suppose the only observation that could be made upon it, is that the will might have been lengthened by repeating it twice over; it might have been put into the first clause, and it might have been put into the second clause, and it might have been put into the third clause. I am not sure, but I rather entertain the opinion, that for many years conveyancers have endeavoured to shorten deeds and wills, and if instead of two daughters there had been several daughters, say half-a-dozen daughters, and a separate property given to each, omitting all mention in each particular devise of its being for her separate use and free from the control of her husband, could any one say that that was not good draughting to put in all the devises, and then

(1) W. N. 1883, p. 164.

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say as to each of them, "I mean in every one of those cases so and so?" I do not see a distinction between two cases and half-a-dozen, and the moment I arrive at the conclusion that we are to read that as if it were in the clause itself, I am at a loss to distinguish this case from *Orford* v. *Hart.* (1) There, again, no doubt, there is a distinction; there are two or three distinctions between the will of Elizabeth Hayley and the will in that case. No doubt there is a distinction at the very outset upon which the defendants' counsel has founded some very able argument, but again, I think, not an argument that we can give effect to, that in this case we have a distinct devise of the estate direct to the daughter. In *Hart's Case* (1) there was not; there was, no doubt very curiously, a devise to the trustee of the property upon the following trusts to the use of such persons, for such estates and in such manner as his daughter should by deed or will appoint. It begins with that instead of ending with it, as in Elizabeth Hayley's case. And in default of such appointment to the use of my daughter "R. G. P. and her assigns for life, without impeachment of waste," and then came in "for her separate use, free from the control of her present or any future husband," so that again there are transposed, the power of appointment first, the estate for life second, and then, third, an ultimate limitation to the heirs of the daughter. But it is a matter of collocation, the clauses are the same in each will, the life estate, the power of appointment, and the ultimate limitation to the right heirs of the daughter.

I have given the best attention I could to the argument, and I cannot myself come to the conclusion, that because there is this distinction as to the will in which a different provision is found, we are not to look at them all, and give effect to them all in the way my Brother Kay did give effect to them in the case of *Orford* v. *Hart.* (1) I am far from saying I should have come to a different conclusion if that case had not been brought to our attention, and I do not know what conclusion I might have arrived at: it is open to a good deal of argument both ways. The only comfort I have, if there be comfort in a case of this sort, is in seeing, that at all events, according to the natural

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construction of the will, the plaintiff is the person designated by the testatrix as the person whom she intended to have the property in the event of her daughter not making any appointment. She seems to have assumed that if her daughter had children she would make an appointment, and probably that was the only idea: "if she has children she will appoint, and therefore I do not say anything about her having children and not making an appointment." I have no doubt in the world that was the only idea, that ruled her mind at the time: "I give it to her for life, if she has children she may give it to them. I do not say I give it to her children, if she has children and does not make an appointment: I give it to her right heirs:" and that would give it to the plaintiff.

I do not think it necessary to go through the cases: they have been very properly brought to our attention. The principles are settled principles which have been argued on both sides. The trustees only take the legal estate so far as it is necessary and needed for the purpose of carrying out their trusts; and then the question arises, under what circumstances, and when, did the time expire when it was necessary that they should take the legal estate for the purpose of carrying out and executing their trusts? I think the broad answer to that is this, that as soon as the ultimate limitation took effect, there was no longer any necessity for them to have the legal estate. There might be considerable difficulty in coming to any conclusion other than that. There is a difficulty as to that power of appointment as to whether or not it might create a state of things which required the trustees to have the legal estate, but it is not necessary to go into that, because all that has been considered in *Orford* v. *Hart*. (1)

WILLS, J. I am of the same opinion. The case seems to me to be really very difficult, and I should like to join at the outset in the expression of cordial acknowledgment, which has fallen from my Brother Manisty, of the great assistance which we have derived from the arguments, which have been concise and singularly to the purpose, if I may take the liberty of saying so.

The difficulty consists, as is very often the case, not so much

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in principles of construction as in their application, because there is not room for a great deal of contest as to well-recognised principles, and no great contest has been raised as to the principles of interpretation, but rather as to their application. Now, if we take the limitation of the clause affecting the disposition of the property by itself, in the first instance, if it stood entirely by itself it would seem to be pretty free from difficulty; the effect of the Statute of Uses would be to create legal estates as far as I can see throughout the various limitations, which end with the limitations in trust for Eliza Hayley and her right heirs, and inasmuch as, as soon as the right heirs come into possession, as soon as the estate vests in them, as soon as the estate in them comes into possession, and the trustees have no longer anything whatever to do, primâ facie it would seem clear that they take a legal estate, and therefore primâ facie one would suppose that it was a legal estate conferred right through, first upon Eliza Hayley, and then upon such persons of the class mentioned as she might appoint to, and then upon the right heirs.

But then we are obliged to look at the whole instrument, and we find a subsequent clause declaring what the trustees are to do, and what rights and duties are to be vested in them, which, as it seems to me, makes it clear that at one stage of the process at which the estates are carried through the various persons who may be entitled to them, the trustees must have the legal estate, and the clause upon which I put my finger as proving that, is the clause which relates to separate estate created for the wife not by the words "to her separate use," but as it seems to me in unmistakable language, because taking this general clause which is to be applied to the several clauses by which the dispositions of the various properties are affected, taking it distributively and applying it as though it followed immediately upon the one with which we have to do, namely, the clause by which the freeholds are disposed of, we find that the daughter, Eliza Hayley, shall enjoy the estate hereby devised to her, I mean that the trustees shall enjoy the estate hereby devised to them in trust for Eliza Hayley absolutely, free from the debts, control, and engagements of any husband or husbands with whom she may intermarry. I cannot myself see how that can be worked out without giving the trustees the

legal estate. Therefore we have a state of things in which at one end of the chain the trustees must have the legal estate, and at the other end of the chain the right heirs must have the legal estate. If so, there seems to be a point in that chain at which the life estate shifts, and having been vested in the trustees it then becomes vested in somebody else.

Now I confess here arises what, to my mind, is a very great difficulty, and it is one which, giving the utmost weight to every word which has fallen from my Brother Kay, I do not see in his judgment the answer to; but it is hardly possible to suppose that it was not present to his mind, and possibly I exaggerate it from not having had the same experience, especially in these matters of real property: I confess it is one of difficulty to me. It is this, that if the legal estate is to shift and be originally in the trustees, and finally in the right heirs, seeing that Eliza Hayley had the power of creating interests on behalf of her children or some of them which might prolong indefinitely the necessity for a legal estate on the part of the trustees, or that she might give interests which would not require that the legal estate on the part of the trustees should subsist, to my mind a state of things arises in which the quantum of interests to be taken by the trustees is to vary according to circumstances which will happen after the testatrix has made her will. That is not convenient, and it is a kind of construction which, if I am not mistaken, real property lawyers have always struggled against. I confess that I do feel somewhat pressed with that difficulty, and I do not quite see the answer to it myself, but at the same time in the case which was decided by my Brother Kay, it seems to me, precisely that difficulty did arise, and that the only distinction that can be drawn between them really is that there is a distinction in the collocation, and a difference of phraseology out of which we have to piece the intention of the testator. It is so thin and shadowy a distinction that I fail to grasp it for any useful purpose. In the case of *Orford* v. *Hart* (1) equally with this case the so-called trustees took an estate "to the use of such persons, and for such estate, and for such trusts, intents, and purposes, and generally in such manner as my daughter shall at any time after my

(1) W. N. 1883, p. 164.

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decease notwithstanding her coverture appoint by " deed ; then it goes on to say, " And in default of such appointment to the use of her for her life to her separate use, apart from the control of her husband, and in default of such appointment as aforesaid," —that is to say, in case she does not exercise her power of appointment—" then in trust for the right heirs of my daughter." So that it seems to me exactly the same argument might have been used, possibly it was not used, and therefore not noticed by the learned judge. It seems to me precisely the same difficulty arose in that case on this point as arises here, and it is to my mind, I confess, a somewhat formidable one; but seeing that the same difficulty arose there, and that the only tangible distinction that can be made between the two is, that the words which create it stand in rather a different order with relation to the words as to the creation of the life estate, the distinction conveys to my mind nothing at all. Therefore, as it seems to me, this case is governed by the case which was decided by my Brother Kay.

Apart from that difficulty, I should certainly have felt no hesitation in arriving at the same conclusion myself. It is true that in this case there is a set of words directing what the trustees shall do, which are not to be found in the case of *Orford* v. *Hart* (1), but, as it seems to me, the difficulty does not arise in respect of anything that is found in these words, and in that part of the will, but arises solely upon the words to which I have already alluded, and which are found in the disposing part, and the clause by which the disposition is in the first instance affected, because the only words which will create any difficulty, and create any subject for argument in the clause which directs what the trustees shall do, other than those which relate to the separate estate to be created in the wife, are words which speak of the persons beneficially interested as distinct persons from those who are to make the sale and exchange, and so forth. That clearly indicated that, so long as that power is to be exercised by the trustees, they are to be looked upon as having the estate, because the distinction is drawn sharply enough there between the legal estate which they may exercise, and primâ facie would exercise, in making a sale and exchange, and the persons beneficially

(1) W. N. 1883, p. 164.

interested. But then there is no difficulty, if you have already got the construction which I have dealt with, and already got estates provided for in the manner I have indicated,—there is no difficulty in applying those words, because, if either the life estate of Eliza, or the estates of those persons in whom she may create estates, or interests by exercising her power of appointment, may endure, and so long as those estates endure, there is a reason for the trustees exercising those powers which demand a legal estate, and as those two sets of estates and interests have come to an end, there is no longer any such reason. Therefore it seems to me the difficulty is not created by that part of the will, but by the part which relates to the power given to the tenant for life, to Eliza Hayley to create fresh interests by appointment, and inasmuch as that difficulty is entirely and essentially the same in the two cases, that with which we are now dealing, and that of *Orford* v. *Hart* (1), I cannot do otherwise than follow *Orford* v. *Hart* (1), seeing that there is no distinction to be drawn between them in that respect. The other part of the argument of the plaintiff's counsel related to matters on which probably it is not necessary to express any opinion, because, if what has been already said remains unreversed, it is sufficient to carry the point which the plaintiff's counsel has been arguing; and to make out that his client is entitled to succeed in this case. If it were necessary to decide it, I should say it is a matter of such very great nicety and difficulty that I should desire to take further time to consider it. Probably it is not necessary to say anything further about that part of the case.

For these reasons I am of opinion that our judgment must be for the plaintiff.

Judgment for the plaintiff.

The defendants appealed.

Nov. 21. *Henn Collins, Q.C.* (*Crump, Q.C.*, with him), for the defendants. The question in this case is whether the freehold messuage was devised to Eliza Hayley for life only, or in fee simple. The defendants rely upon the rule in *Shelley's Case* (2), and contend that by force of it Eliza Hayley took an estate in

(1) W. N. 1883, p. 164. (2) 1 Rep. 93 b.

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fee simple: they admit that in order that the rule may apply, both the estate for life and the estate of inheritance in remainder must be of the same quality, that is, either both legal or both equitable: 2 Jarman on Wills, c. 36, 4th ed., p. 335. But the trustees took the legal estate in the inheritance; they were authorized to sell and also to reimburse themselves; and in order to carry out the intentions of the testatrix, it must be held that the trustees were invested, not with a mere power of sale, but with an estate in fee simple: *Gibson* v. *Rogers* (1); *Bagshaw* v. *Spencer* (2); 2 Jarman on Wills, ch. 34, 4th ed., p. 295. The judges of the Queen's Bench Division decided in favour of the plaintiff chiefly on the authority of *In re Hart's Estate, Orford* v. *Hart* (3); if that decision were in point, it would follow that in the present case the trustees took only an estate for the life of Eliza Hayley, and that the plaintiff took as a purchaser the legal estate in the remainder to her right heirs. But *In re Hart's Estate, Orford* v. *Hart* (3), is not an authority against the defendants: the trustee in that case does not appear to have been invested with authority to sell or to reimburse himself.

Lumley Smith, Q.C., and *J. R. Paget*, for the plaintiff. If the construction contended for by the defendants' counsel is correct, the defendants are relying upon a mere equitable estate: in order to perfect their title, they ought to have obtained a grant of the outstanding legal estate in the fee simple, which remains vested in the representatives of the trustees named in the will. But in point of fact, the trustees took only an estate for the life of Eliza Hayley; that estate for her life was vested in them by force of the clauses in the will directing that her receipt should be a discharge to them, and that she should enjoy the property free from the debts, control, or engagements of any husband, and that the trustees should be at liberty to reimburse themselves. After the death of Eliza Hayley the legal estate in the inheritance devolved upon the plaintiff as purchaser under the ultimate limitation. The rule in *Shelley's Case* (4) does not apply; for the estate for life devised to Eliza Hayley, being equitable, cannot coalesce with the limitation to her right heirs which is legal. The trustees

(1) 1 Amb. 93, at p. 95.
(2) 1 Ves. Sen. 142, at p. 144.
(3) W. N. 1883, p. 164.
(4) 1 Rep. 93 b.

took no estate in the inheritance, but only a power of sale: *Doe* v. *Shotter* (1); and a power of sale given to executors or trustees does not confer upon them any estate in the land: Sugden on Powers, ch. 4, s. 1, 8th ed., pp. 112, 113.

[COTTON, L.J. In the present case the freehold messuage was devised in express terms to the trustees, their heirs and assigns: in *Doe* v. *Shotter* (1) no estate of any kind was given to the executors: they had only a bare power of sale.]

It ought not to be held that the legal estate in the fee simple has been devised to the trustees merely on the ground, that the messuage is limited to them, their heirs and assigns; the intentions of the testatrix must be followed so far as they can be gathered from the other provisions of the will: *Cunliffe* v. *Brancker*. (2)

[COTTON, L.J. In that case some of the powers conferred upon the trustees, such as the power of revoking the uses created by the will, would have been superfluous, if the trustees had been intended to take the legal estate: the insertion of these powers shewed that the trustees were intended not to take it.]

But, further, the limitation to the right heirs of Eliza Hayley is not really a remainder, and is in truth an executory devise, and therefore is of such a nature that it cannot coalesce with the preceding estate for life. She had a power of appointment amongst her own children; it is true that as she had no children, it could not be exercised; but the mere creation of the power shews that the testatrix intended to give, and did give, to the children of Eliza Hayley by implication an estate commensurate with the greatest possible estate, which could be limited to them under the power of appointment, namely, an estate in fee simple as tenants in common: *Bradley* v. *Cartwright*. (3) The whole fee simple having been thus disposed of, the ultimate limitation to the right heirs of Eliza Hayley is bad as a remainder, and cannot take effect as such, for a fee cannot be mounted upon a fee by way of remainder. The limitation to the right heirs of Eliza Hayley takes effect as an executory devise coming into existence upon the failure of the estate given to the children.

(1) 8 A. & E. 905.

(2) 3 Ch. D. 393.

(3) Law Rep. 2 C. P. 511.

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[LORD ESHER, M.R. No estate can exist by implication when there is an express grant or devise. In the will before us there is an ultimate limitation in express terms to the right heirs of Eliza Hayley in default of the exercise of the power of appointment amongst her children: therefore no estate can be implied in favour of the children.

COTTON, L.J. The decision in *Bradley* v. *Cartwright* (1) turned upon the words of the will, the construction of which was disputed in that case: there the ultimate limitation was "in default of such issue;" in the present case the ultimate limitation is "in default of such appointment."]

In re Jeffery's Trusts (2) is an authority in the plaintiff's favour: the tenant for life of certain trust funds had power to appoint the capital amongst her "children, grandchildren, or other issue;" and it was held by Malins, V.C., that there was an implied gift to the objects of the power in default of appointment.

It is clear law that the rule in *Shelley's Case* (3) does not apply where the limitation subsequent to the estate for life is an executory devise and not a remainder. (4)

[LORD ESHER, M.R. That may be assumed for the purposes of the present argument.]

Henn Collins, Q.C., in reply. As to the last point urged by the plaintiff's counsel, the limitations in the will of Elizabeth Hayley very much resemble those occurring in the case of *In re White and Hindle's Contract* (5); and there an unhesitating opinion was expressed by Malins, V.C., that the limitations were contingent remainders and not executory or conditional limitations. (6)

(1) Law Rep. 2 C. P. 511.

(2) Law Rep. 14 Eq. 136.

(3) 1 Rep. 93 b.

(4) See Fearne on Contingent Remainders, vol. i. p. 276; vol. ii. p. 209 (10th ed.); Tudor, L. C. on Real Property, p. 601 (3rd ed.), note to *Shelley's Case*; 2 Jarman on Wills, ch. 36, p. 332.

(5) 7 Ch. D. 201.

(6) Even if the construction contended for by the plaintiff's counsel had prevailed, that in default of appointment an estate in fee was by implication limited to the unborn children of Eliza Hayley as tenants in common, it would seem that the ultimate remainder to her right heirs could not be construed to be an executory devise, and that the true construction of the will required that the implied estate in fee to the children of Eliza Hayley and the ultimate limitation to her right heirs must be read as concurrent contingent remainders or a "contingency with a double aspect:" Fearne

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As to the first point urged by the plaintiff's counsel, the freehold messuage was devised to the trustees, their heirs and assigns: these words, primâ facie, conveyed to them indefeasibly the legal estate in the fee simple and rendered all the subsequent limitations merely equitable. The only difficulty which can be really urged against this construction, is that the will of Elizabeth Hayley was made in the year 1833, and that as to wills made before the 1st of January, 1838 (1), the rule of construction was that trustees took no estate greater than was necessary to enable them to fulfil the purposes of the trust. In the present case, however, the duties devolving upon the trustees were such as to require them to take the fee simple: a mere power would be insufficient to enable them to discharge the trust reposed in them.

LORD ESHER, M.R. The first thing that I desire to do, is to prevent, if I can, in future that which is printed as a saying of Vice-Chancellor Malins in *In re Jeffery's Trusts* (2) from being quoted again as a general rule. If it is treated as a general rule, the first part of his judgment deals with a will in which there was no gift or bequest to children in default of appointment, but there was an express gift over, and he goes on to say: "The testator, however, continues, 'and in default of such direction and appointment,' which, I think, means 'in default of children.'" If that is quoted as a general interpretation of the words, "and in default of such direction and appointment"—that wherever those words are used together with a similar context, they mean in "default of children"—all that I can say is, that in my judgment it is absolutely wrong. I do not believe that the Vice-Chancellor ever uttered the proposition in those

on Contingent Remainders, vol. i. p. 373; vol. ii. p. 272. A limitation, which could be read as a contingent remainder, could not at common law be construed to be an executory devise: *Purefoy* v. *Rogers*, 2 Wms. Saund. 768, at p. 781 (ed. 1871); 1 Fearne on Contingent Remainders, p. 386 (10th ed.); 1 Jarman on Wills, ch. 26, p. 864 (4th ed.). The rule in *Shelley's Case* holds good as to contingent estates: 2 Jarman on Wills, ch. 36, p. 340 (4th ed.). And for the application of the rule the old law as to contingent remainders seems still to exist notwithstanding 8 & 9 Vict. c. 106, s. 8, and 40 & 41 Vict. c. 33.

(1) As to wills made after the 31st of December, 1837, see 1 Vict. c. 26, ss. 30, 31.

(2) Law Rep. 14 Eq. 136, at p. 139.

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terms without some restriction to the particular case. It is in the teeth of the well-known rule, that where there is an express stipulation, there can be no implication, and therefore it cannot be implied that the words "in default of such appointment" mean "in default of children." He could not have based his proposition upon the doctrine of implication, because it is quite contrary to what, I think, is rightly laid down in 1 Jarman on Wills, ch. 17, p. 551 (4th ed.), that "an express gift over in default of appointment, in favour of either the objects of the power or any other person, of course precludes all implication." If nothing can be implied, obviously the meaning of the words "in default of appointment" cannot be "in default of children."

These considerations get rid of the latter part of the argument of the plaintiff's counsel: it is wholly inapplicable to the present case.

Now I come to the other point. I shall not say much about the rule in *Shelley's Case*. (1) I have heard some judges say that in their opinion it was the most unjust decision that ever was come to. I shall not give that as my view: but it is a decision which I never could understand how anybody could come to. That, however, has nothing to do with the question before us. The doctrine has been a rule of law for too many hundred years, I suppose, for anybody to interfere with it. The question is whether that rule applies to this case. If this case is within the rule, we must apply it. There is a well-known doctrine about that rule, namely, that where the two estates, which otherwise would be joined together, as it were, by reason of the rule, are, the one of them legal, the other equitable, they cannot be joined, and the rule does not apply: the estates must be both equitable or both legal. And the question as to this will is whether the two estates, which the defendants desire to join by virtue of the rule in *Shelley's Case* (1), are both equitable or are both legal: if they are, the rule applies; if the one is legal and the other equitable, it does not apply.

The two estates in question are the life-estate which was given to Eliza Hayley, and the ultimate remainder over. It is admitted that the life-estate given to her is equitable: or, to put the matter

(1) 1 Rep. 93 b.

in another way, it is admitted that during her life the legal estate was in the trustees. Therefore the question is narrowed to this, whether the legal estate in the ultimate limitation after her death is still in the trustees, or whether that legal estate has gone to the beneficiaries, and is no longer in the trustees. How am I to ascertain that? I must ascertain that also by settled rules of interpretation. The rule applicable to the case seems to me to be that laid down in 2 Jarman on Wills, ch. 34, p. 295, 4th ed. Everybody seems to agree that that rule is rightly laid down. If with regard to this freehold messuage there had been simply a direction to the trustees to convey without any words of devise to them, then it might have been said that only a power was given to the trustees; but that is not the case: it is not a mere direction to the trustees to convey without any words of devise to them: there are words of devise to them. Let me see what the rule is: it is thus stated: "Where the duty imposed on the devisee is to sell or convey the fee-simple, he is held to take the inheritance to enable him to comply with the direction." Stress is laid upon the words, "Where the duty imposed on the devisee is to sell or convey the fee simple." In the present case there are devisees who are trustees of the will; but it is said that no absolute and peremptory duty has been imposed upon them to sell or convey. But what is the real meaning of this passage which I have cited? When the whole of it is read, it seems to me to be this, namely, that where property is devised to be sold or conveyed so that under some circumstances it is the duty of the devisee to sell or convey the fee simple, he is held to take the inheritance; and the passage does not mean only where there is an absolute duty to sell or convey, but where, under some circumstances, according to the will he is to sell or convey, then he is held to take the inheritance to enable him to comply with the direction. Let me go on, and it will be seen that this is the meaning of the passage. "Though in such a case it is too much to affirm that the testator's intention cannot in any other manner be effected; for, by means of a power, the trustee might be authorized to convey without himself having an estate." That is true. "It seems to be a more reasonable construction, however"—this is the reason of the rule—"that the testator by devising the

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property to the person who is directed to make the conveyance or sale, intended not merely to make him the medium or instrument through which to vest the estate in the beneficial devisee, but that he"—that is, the original devisee—"should take an estate commensurate with the duty which was assigned to him; and the ground for this construction is obviously strengthened when there are other purposes"—which, I should say, means "expressed in the will,"—"requiring that the trustee should have some estate." It seems to me that this case is within both parts of the reason assigned for the rule. First, there is a devise to trustees, and under certain circumstances it would become their duty to sell or convey; and it seems to be a more reasonable conclusion, that the testatrix, by devising the property to them with such directions, that, under certain circumstances, it would be their duty to sell, must have intended that they should have the legal estate in the inheritance. Secondly, there are other purposes requiring that the trustee should have some estate. We have already held that for the purposes of creating a separate use in favour of Eliza Hayley and of reimbursing the trustees they must be held to take an estate for her life; and this circumstance strengthens the view that the trustees were to take also the inheritance. Therefore this case is within both parts of the reason for the rule.

It seems to me, therefore, that the true construction of this will is, that the trustees with regard also to the inheritance had the legal estate, and that if they had, the ultimate limitation to the right heirs of Eliza Hayley was an equitable estate. Therefore, as both the estate given to Eliza Hayley for her life and the ultimate limitation to her right heirs are equitable, they can be joined together, and the rule in *Shelley's Case* (1) applies.

It seems to me that the point argued before us on behalf of the defendants was not presented to the minds of the learned judges in the Divisional Court in such a manner as it might have been; and I think that if it had been brought to their attention in the same way in which it has been brought to ours, and without being mixed up with some other points which probably drowned it in their minds, they could have come to the same conclusion as that at which we have now arrived.

(1) 1 Rep. 93 b.

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COTTON, L.J. I also think that the appeal must succeed. The question arises between grantees from Eliza Hayley on the footing that the fee had been devised to her by the will of Elizabeth Hayley, and the right heir of Eliza Hayley, who succeeded in the Court below and is the respondent here. The question turns upon the construction of the will of Elizabeth Hayley, and the point shortly stated is whether, under the gift to Eliza Hayley's right heirs, they take by purchase, or whether, under the rule in *Shelley's Case* (1), that gift coalesces with the life-interest devised to Eliza, so that she took the fee. In my opinion she did take the fee.

The case has been argued in more ways than one. In the first place, it is said that the rule in *Shelley's Case* (1) does not apply unless the subsequent limitation to the heirs is by way of remainder, and that in the present case the ultimate limitation to Eliza Hayley's right heirs is not by way of remainder, but is an executory limitation following a previous gift by implication to her children in fee. Of course, after a gift in fee there can be no remainder: an estate in fee leaves no remainder to be disposed of, and any gift after it must be by way of executory limitation. But I cannot accede to the argument that the gift to Eliza Hayley's right heirs is by way of executory limitation. No doubt a power was given to the tenant for life to dispose of the property amongst her children: that is to say, the trustees were directed to hold it on such trusts as she might appoint for the benefit of her children; and the gift to her right heirs is in default of an appointment. As I understand the argument, it is that on this form of disposition a gift to the children in fee must be implied, although the power of appointment has not been exercised. In my opinion that is a wrong construction of this will. It may be that under certain circumstances and in certain wills, where there is a gift to children for such estates as a certain person shall appoint, and no appointment takes place, nevertheless there is a gift to them; but, in my opinion, there is no room for that construction of the will before us, because a simple power was given to the daughter to direct on what trusts for the benefit of her children this property was to go, and then, in default of appoint-

(1) 1 Rep. 93 b.

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ment, there was a limitation over. Neither the words "and in default of children," nor any words of that kind, were inserted, and I cannot see that there was an implied gift to the children of Eliza Hayley, if the power of appointment should not be exercised by her. *Bradley* v. *Cartwright* (1) was referred to; but, as I understand the case, it lays down no such principle as is contended for on behalf of the plaintiff. The Court of Common Pleas merely decided that the words which were in question must be read in a restricted sense, and must be deemed to be words of purchase.

Then I have to consider this question, namely, whether the gift to Eliza Hayley's right heirs was the gift of an equitable or legal estate, the previous life-interest devised to her being only an equitable estate. That is on the principle that the rule in *Shelley's Case* (2) can be applied only where the estate for life and the estate in remainder are of the same quality, that is, both legal or both equitable. I am of opinion that in the present case both the estates are equitable estates, and I will dispose at once of *In re Hart's Estate, Orford* v. *Hart* (3), before Kay, J., as inapplicable to this. It is unnecessary to determine whether that case was rightly or wrongly decided, because in it there was nothing to shew that the estate was to be in the trustees beyond the life-interest of the devisee, the testator's daughter, in whose favour a separate use was created. There were no directions to sell. The question generally is, whether in the will it is apparent that the testator intended the trustees to have the legal estate for any limited period or for all time. On this ground, in construing wills what has been done is this, to give the legal estate in accordance with what the Court sees is the intention of the testator; therefore, when there are words of trust or words of devise to trustees to uses or upon trusts, the Court executes the uses or the trusts, not by force of the Statute of Uses, but by giving the legal estate to the trustee or to the beneficiary, according to what the Court sees to have been the intention of the testator. It must be ascertained, not merely whether any duty—any trust—is to be performed by the trustees, which

(1) Law Rep. 2 C. P. 511. (2) 1 Rep. 93 b.
(3) W. N. 1883, p. 164.

requires the legal estate to remain in them, but also whether, after taking into account all that the trustees are directed or authorized to do, a judge ought to come to the conclusion that the testatrix intended them to act by virtue of the estate vested in them, or by virtue of something else—a power to limit to uses. In the present case the direction as regards the tenants for life, the two daughters, is that their receipt shall be "a discharge to my trustees for all moneys payable to my said daughters." That of course involves this, that the trustees were to receive the rents and then pay them over to the daughters. That shews that the legal estate must remain in the trustees, at least for the period during which the separate use lasts; but is it to remain for that period only? In my opinion it is not, and for that I rely upon the directions given as to the discretion vested in the trustees as regards selling.

Before I go to the directions as to sale, I must allude to another part of the will. Other property was devised: some copyhold property was given to another daughter; and then there is a devise of four cottages, which in substance is as follows: each daughter was to have a life-interest in a moiety, and her moiety, if she should have children, was to go to her children; but if either daughter should die without children, there was a limitation over to the other daughter and her children: but words are used which shew that the testatrix contemplated that the legal estate should be throughout in the trustees, because after the daughters' death there was to be a conveyance to those who had become beneficially entitled. The limitations are concluded by words similar to those used in the preceding parts of the will: "and, in default of such appointment, in trust for the right heirs of the survivor." In my opinion, on that gift there can be no doubt that the trustees had in them the whole legal estate, and after the performance of the trusts they were to convey the property if it should become necessary. A discretion—it is a discretion, I agree—is given as to sale, applicable not only to the four cottages, but also to that of which the legal estate was, upon the true construction of the will, vested in the trustees. As regards this property, the discretion was to be exercised during the time when admittedly the

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legal estate was vested in the trustees, namely, during the lifetime of the daughters, and also during the time when other persons should be beneficially interested. The words directing the sale are, "I direct that it shall be lawful for my trustees, or the survivor, or the heirs, or assigns of the survivor, by and with the consent in writing of my said daughters, or the survivor, or other the person or persons, who shall from time to time be beneficially interested under the trusts aforesaid." These words shew to my mind that with regard to the persons beneficially interested other than the daughters the testatrix considered that they were distinct from the trustees, who had no beneficial interest, but merely a legal interest. The trustees might sell the whole or any part of the property; and after they had done that, they were to hold the moneys arising from the sale, "as also such lands as may be received in exchange for any part thereof, upon the same trusts as the said estates so to be disposed of were originally held upon." That was to be done after the deaths of the daughters, but still the hereditaments to be taken in exchange were to be held by the trustees; and this would be inapplicable to the case of their having no legal estate then vested in them, but merely a power to limit uses. It has been argued that this view is against what was laid down in *Cunliffe* v. *Brancker*. (1) That was a decision of the Court of Appeal; but in that case the whole will was framed on the footing of the beneficial interest being united with the legal interest, and there was an express limitation to the trustees for the term of 120 years. That shews that the estate was intended to be taken out of them for that time. It is said that that case laid down that where effect is to be given to a direction for sale, it is to be treated as a mere execution of a power of sale. In my opinion that case lays down nothing of the kind. But what James, L.J., especially calls attention to, is that the direction as to sale was in terms to be carried out by alteration and limitation of the uses; so that it would have been to go against the sense to be collected from the words used by the testator, if the trustees had been held to take the legal estate in the fee simple. In my opinion we have here what there was not in the case before Kay, J.: we have an

(1) 3 Ch. D. 393.

indication that something was to be done by the trustees in accordance with the directions of the will, which, at least as regarded part of it, must be done by acting on the legal estate. In my opinion, the proper conclusion is that whenever this authority was to be exercised, it was to be not by way of limitation of uses, but by means of the conveyance of an estate, which the testatrix intended to remain vested in the trustees.

The cases, which have been referred to as regards the construction to be put upon an authority to executors to sell, in my opinion do not bear upon the question before us; because if there is a devise to executors to sell, they have the estate vested in them, and they are to sell by means of it; whereas if the devise is merely that the executors shall sell, a power only is given. In this case admittedly there is a devise to the trustees. The only question is, how long is the legal estate to remain in them? Is it to remain in them absolutely or only for the life of Eliza Hayley, and after her death is it to be transferred to and vested in the beneficiaries who are to take under the gift to the right heirs of the tenant for life? In my opinion both estates were equitable, and therefore the rule in *Shelley's Case* (1) applies, and the appeal succeeds.

BOWEN, L.J., concurred.

Judgment for the defendants.

Solicitor for plaintiff: *Arthur Percy Jackson.*

Solicitors for defendants: *Bower, Cotton, & Bower, for Sharp & Son, Lancaster.*

(1) 1 Rep. 93 b.

J. E. H.

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PROCTOR *v.* WEBSTER.

Defamation—Privileged Occasion—Absolute Privilege—Letter to Lords of the Privy Council.

An action of libel may be maintained for statements in a letter addressed to the Privy Council injurious to the character of the plaintiff, a public officer removable by the Privy Council, upon proof of express malice in the defendant.

MOTION to enter judgment for the defendant on the ground that the libel for which the action was brought was published on a privileged occasion.

At the trial before Denman, J., at the Nottingham Winter Assizes, 1885, it appeared that the plaintiff was sanitary inspector of the borough of Newark under the Contagious Diseases (Animals) Act, 1878, 41 & 42 Vict. c. 74, s. 42, and the libel was contained in a letter written by the defendant and addressed to "The Lords of Her Majesty's Most Honourable Privy Council." This letter charged the plaintiff with irregularities in the exercise of his office, and with taking a bribe from the owner of sheep which had been condemned as diseased.

It was objected that the occasion upon which the libel was published made it absolutely privileged, but the learned judge admitted evidence of express malice and left the case to the jury, who found a verdict for the plaintiff, damages 350*l.*

J. H. Etherington Smith, for the defendant. The libel was absolutely privileged, and the learned judge misdirected the jury in allowing them to consider whether there was express malice. Under the Contagious Diseases (Animals) Act, 1878, 41 & 42 Vict. c. 74, s. 42, the local authority are to appoint so many inspectors and other officers as they think necessary for the execution and enforcement of the Act, and by sub-s. 3 the Privy Council, on being satisfied on inquiry that an inspector of a local authority has been guilty of misconduct or neglect, may direct his removal. It follows that the defendant in addressing the Privy Council was applying to a tribunal competent to remove the plaintiff, and his letter was a proceeding in the due course of justice. In *Lake* v. *King* (1), where the libel was in a petition to the

(1) 1 Wms. Saund. 120, 132.

Committee of Parliament for grievances, it was held, that even though the matter contained in the petition was false and scandalous, no action lies, because it is in a summary course of justice, and before those who have power to examine, whether it be true or false. And in *Hare and Meller's Case* (1) it was held to be no cause of action that the defendant had exhibited to the Crown a slanderous libel against the plaintiff charging him with forgery. If the defendant is held responsible it will interfere with his right of addressing a petition to the Sovereign. [He also contended that the evidence at the trial of express malice was insufficient.]

R. Harris, for the plaintiff, was not heard.

POLLOCK, B. I am of opinion that there was no misdirection. The question of law which has been raised is one of some interest, now that so many public officers are liable to be removed by the Privy Council under the powers which that important body possesses, not only by the common law, but by numerous Acts of Parliament. The Privy Council might no doubt have directed an inquiry into the conduct of the defendant, an inquiry which would have been in the nature of a judicial proceeding, and it is argued that a complaint made to them is absolutely privileged even when there is proof of express malice, in the same manner as a statement made during proceedings in one of the regular Courts of Justice. It is unnecessary to inquire into the nature of the functions which the Privy Council exercise under 41 & 42 Vict. c. 74, s. 42, and how far their powers under this Act differ from those of the ordinary constitutional body, for it cannot be pretended that on the present occasion they were exercising judicial functions.

In *Lake* v. *King* (2) the libel was addressed to a committee appointed by the House of Commons to hold an inquiry and take evidence, and this committee exercised judicial duties in the same manner as the ordinary parliamentary committees. In *Hare and Meller's Case* (1) the proceeding was also judicial, for the jurisdiction of the Court of Chancery was then not so clearly defined as it is now, and all petitions for relief in equity were addressed to the

(1) 3 Leon. 138.

(2) 1 Wms. Saund. 120, 132.

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Sovereign generally. Apart from judicial proceedings there is a class of cases where complaints have been made to high officers of state, and in which it has been held that statements made in such complaints are privileged, in the same manner as statements by masters relating to their servants. In none of these cases has it been suggested that there is any such absolute privilege as that contended for.

As to the other point, I think the evidence of express malice was sufficient.

MANISTY, J., concurred.

Judgment for the plaintiff.

Solicitor for plaintiff: *C. H. Robertson.*

Solicitor for defendant: *Clinton, for W. H. Stevenson, Nottingham.*

A. P. S.

Nov. 28.

EX PARTE WILKS.

Municipal Corporation—Election—Illegal Practice—Application for Relief, when entertained—Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 *Vict. c.* 70), *s.* 20.

Where a candidate at a municipal election applied, under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, for relief against the consequences of an illegal practice, and it appeared that the applicant had been elected, and that a petition had been presented and was pending against his election, the Court refused to entertain his application for relief, which was ordered to stand over until after the trial of the election petition.

APPLICATION under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (1), for relief against the conse-

(1) "S. 20. Where, on application made, it is shewn to the High Court or to a municipal election court by such evidence as seems to the Court sufficient—

(*a*) that any act or omission of a candidate at a municipal election for a borough or ward of a borough, or of any agent or other person, would, by reason of being in contravention of any of the provisions of this Act, be but for this section an illegal practice, payment, employment, or hiring; and

(*b*) that such act or omission arose from inadvertence or from accidental miscalculation, or from some other reasonable cause of a like nature, and in any case

quences of an illegal practice committed by a candidate at a municipal election.

The applicant, being a candidate at an election for the London School Board, was guilty of an illegal practice under s. 14 of the above Act, by issuing circulars and posters having reference to the election which did not bear on the face thereof the name and address of the printer and publisher.

The applicant, having been elected, applied ex parte on the 11th of November for relief in respect of this omission when G. W. Eayres, who was an unsuccessful candidate at the same election, appeared and opposed the application, the hearing of which was thereupon adjourned in order to enable Eayres to file affidavits.

Upon the application now being renewed, it appeared from the affidavits that a petition had been filed against the election of the applicant, alleging that he had been guilty of bribery and undue influence, and also that the omission of the printer's name and address was relied on as shewing an act of bribery.

R. Henn Collins, Q.C., and *Muir Mackenzie*, for G. W. Eayres.
G. M. Freeman, for the applicant.

POLLOCK, B. I should be content to say simply that this application could not be entertained, were it not that the matter is of general importance. The question arises in this way: An application was made under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, which enables a man by applying to the Court to purge himself from, and avoid the consequences of, a slip or irregularity in his proceedings. When the

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did not arise from any want of good faith; and

(c) that such notice of the application has been given in the said borough as to the Court seems fit;

and under the circumstances, it seems to the Court to be just that the said candidate, agent, and person, or any of them, should not be subject to any of the consequences under this Act of the said act or omission, the Court may make an order allowing such act or omission to be an exception from the provisions of this Act which would otherwise make the same an illegal practice, payment, employment, or hiring, and thereupon such candidate, agent, or person shall not be subject to any of the consequences under this Act of the said act or omission."

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application was heard it appeared that a petition was intended to be presented against the election of the applicant upon independent grounds, and we therefore allowed the application to stand over. It now appears that the petition has been presented, charging the applicant not only with irregularity, but with bribery and undue influence. It is obvious that it would be impossible upon the present application to enter into the question whether the petition was likely to succeed or to fail, without taking upon ourselves more than we are justified in taking. Then comes the question, is it right to take out of the petition the question whether Mr. Wilks was guilty of a mere irregularity with respect to the omission of the printer's name from the posters, and to decide that question here? I think not. I think it cannot be intended that the Court should do that, were the circumstances even stronger than they are. The Court cannot hear the whole case; it ought not to entertain one part of it. I therefore think that we ought not to say whether Mr. Wilks has or has not been guilty of a mere irregularity, which is the question in this application. The application must stand over until after the trial of the petition.

MANISTY, J., concurred.

Order accordingly.

Solicitors for applicant: *Baylis & Pearce.*
Solicitors for G. W. Eayres: *Pontifex, Hewitt, & Pitt.*

W. A.

EDGE *v.* BOILEAU AND OTHERS. 1885 Nov. 20.

Landlord and Tenant—Quiet Enjoyment, Covenant for, Breach of—Notice to Tenants not to pay Rent—Conditions Precedent—Independent Covenants.

A lease contained a covenant by the lessors for quiet enjoyment by the lessee in the usual terms, viz., that the lessee paying his rent and performing his covenants should quietly enjoy the premises without interruption from the lessors or any one claiming under them. There were also covenants by the lessee to pay rent and keep the premises in repair. The rent being in arrear and the premises out of repair, the lessors caused notices to be served on the lessee's sub-tenants requiring them not to pay rent to the lessee but to themselves, and threatening legal proceedings in default of compliance with the notice. The lessors though requested to withdraw the notice by the lessee refused to do so for a period of several weeks, and in the meantime, in consequence of the notice, one of the lessee's sub-tenants paid rent to the lessors :—

Held, that there was evidence of a breach of the covenant for quiet enjoyment, and that, that covenant and the covenants by the lessee to pay rent and repair being independent covenants, an action was maintainable by the lessee.

MOTION for a new trial or to enter judgment for the defendants.

The action, which was tried before Mathew, J., at the last Birmingham Assizes, was for breach of a covenant for quiet enjoyment contained in a lease of premises, comprising several sets of offices and business chambers, by the defendants to the plaintiff. The facts were as follows :—

The lease contained covenants by the plaintiff to pay the rent reserved and to keep the premises in repair, and provided for re-entry by the lessors, if rent should be in arrear for twenty-one days, and if on demand thereof there should not be sufficient distress on the premises, or if the lessee should not duly observe the covenants on his part after three months' notice in writing so to do. The covenant for quiet enjoyment was in the usual terms, to the effect that the lessee paying the rent when due, and observing the covenants on his part to be observed, should peaceably and quietly hold and enjoy the said premises without interruption from the lessors or persons claiming through them. The plaintiff's rent being in arrear and the premises being out of repair, the defendants' agent, by their authority, served notices in writing on the plaintiff's sub-tenants of the demised premises requiring them not to pay to the plaintiff any rent due or there-

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after to become due to him, but to pay the same to the defendants, and threatening legal proceedings in default of compliance with the notice. The plaintiff, having paid the rent in arrear, requested the defendants to withdraw the notices, complaining that they would occasion him great difficulty in obtaining his rents from his sub-tenants, but the defendants refused to do so because the plaintiff had not executed certain repairs which they required him to do. The defendants, however, ultimately, after an interval of about two months, withdrew the notices. In the meantime one of the plaintiff's sub-tenants paid his rent to the defendants.

The plaintiff brought his action as above-mentioned, alleging loss of rent and damage to the value of his property, by reason of his title being impugned.

The defendants in their defence (inter alia) denied the breach of covenant, pleaded non-performance by the plaintiff of conditions precedent, and paid into court the rent so received by them plus five shillings in satisfaction of plaintiff's claim. The learned judge left the case to the jury who found a verdict for the plaintiff for 100*l.* damages.

Channell, Q.C., and *Graham*, for the defendants, moved for a new trial or to enter judgment for the defendants on the ground that there was no evidence of any breach of the covenant for quiet enjoyment by the defendants, and that the covenant was conditional on performance by the plaintiff of his covenants. (1)

The notice given by the defendants does not amount to a breach of the covenant for quiet enjoyment. There was no physical interference, either actual or constructive, with the plaintiff's enjoyment. The plaintiff's tenants were legally liable to pay their rents, and could be compelled to do so; and the notice was a mere nullity and idle threat. The payment of rent by the sub-tenant to the defendants is not in contemplation of law the natural consequence of the notice, and such payment would not discharge the tenant. The real grievance, if any, is in the nature of slander of title not breach of the covenant for

(1) The rule was also moved on the ground that the damages were excessive, and that the judge had misdirected the jury as to the measure of damages, but it is not thought that the decision on those points involved any such novelty in point of principle as to call for a report.

quiet enjoyment: *Whichcot* v. *Nine*. (1) The meaning of the covenant is that the plaintiff shall not be disturbed in possession. There was no disturbance of his possession inasmuch as he could at any moment have compelled his tenants to pay. Secondly, the covenant for quiet enjoyment is dependent upon the covenants to pay rent and repair. There was therefore a failure on the part of the plaintiff to perform conditions precedent to his right to recover on the covenant for quiet enjoyment. [They cited *Bastin* v. *Bidwell* (2), *Grey* v. *Friar* (3) and *Child* v. *Stenning*. (4)]

Hugo Young, and *Lindsell*, for the plaintiff, shewed cause. *Whichcot* v. *Nine* (1) was not like the present case. Nothing more was decided there than that, where a tenant was forbidden to pay his rent, but the rent was nevertheless paid, there was no breach of the covenant for quiet enjoyment. It may well be that the Court in that case thought there was no substantial interference with the enjoyment of the premises. Here one tenant actually paid rent to the defendants, and the defendants insisted on the notice for a considerable time. There is an actual interference with the quiet enjoyment when the receipt of the rents and profits is prevented.

The covenant for quiet enjoyment is an independent covenant. [They cited *Saunderson* v. *Mayor of Berwick*. (5)]

POLLOCK, B. The plaintiff claims damages for breach of a covenant for quiet enjoyment. The defendants deny that any such breach has taken place, and say further that there was a failure to perform conditions precedent, rent being in arrear, and the covenant to repair not being performed. In my judgment there is sufficient evidence to shew that there has been a breach of the covenant for quiet enjoyment. The covenant is in the usual terms. The facts are these. During the plaintiff's term, there being some rent in arrear, the agent for the defendants, the plaintiff's lessors, by their authority sends to the tenants of the plaintiff a notice desiring them not to pay their rents to the plaintiff, but to pay them to the defendants, and threatening

(1) Brownlow & Goldsborough, 81.
(2) 18 Ch. D. 238.
(3) 4 H. L. C. 565.
(4) 11 Ch. D. 82.
(5) 13 Q. B. D. 547, 551.

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them with legal proceedings in default of compliance with the notice. It is obvious what the probable results of such a notice would be. It is impossible, as it seems to me, to hold that, under the circumstances of this case, and having regard to what actually followed, this notice can be treated as no more than a mere false and idle claim or threat of which no notice might be taken. To my mind there is evidence of a substantial disturbance of the plaintiff's quiet enjoyment of the property demised. The case of *Whichcot* v. *Nine* (1) is the only authority to which we were referred on this subject. When the report of that case is looked at, it is very short and simply comes to this, that the mere telling a tenant not to pay his rent is not necessarily a breach of the covenant for quiet enjoyment. There is nothing said as to the circumstances under which the man was told not to pay his rent, and it appears that he did pay his rent notwithstanding the notice. I can understand that there might be circumstances under which such a notice might be treated as a mere idle threat and as not amounting to a breach of the covenant for quiet enjoyment because there was no substantial interference with the enjoyment. Here I think that there is a substantial interference with the rights of the plaintiff, and one which might very well seriously affect the value of his property. Then it was contended that the covenant for quiet enjoyment and the covenants to be performed by the plaintiff were not to be read independently, but as dependent covenants, and that the payment of rent and repairing were therefore conditions precedent. I should have thought that point very clear even without authority. But there appears to be a case directly in point, viz., *Dawson* v. *Dyer*. (2) In that case the same argument was put before the Court as in the present case, and the Court held the argument untenable. That case seems to be conclusive in favour of the plaintiff on this point. For these reasons I think the application must be refused.

MANISTY, J., concurred.

Rule refused.

Solicitors for plaintiff: *Burton & Co.*, for *Allen & Edge.*

Solicitors for defendants: *Blake & Heseltine*, for *Field, Son, & Pulley.*

(1) Brownlow & Goldsborough, 81. (2) 5 B. & Ad. 584.

E. L.

WALROND *v.* GOLDMANN.
THE REAL AND PERSONAL ADVANCE COMPANY (CLAIMANTS).
MILLS BROTHERS *v.* GOLDMANN AND WIFE.
THE REAL AND PERSONAL ADVANCE COMPANY (CLAIMANTS.)

1885
Nov. 30.

Bill of Sale—Bill of Sale given by Equitable Owner—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31)—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).

Upon a judgment against a husband and wife jointly, certain household furniture was taken in execution at the house where they resided. On an interpleader issue to try the title to such furniture as between the execution creditors and claimants, it appeared that before the marriage the husband had executed a deed declaring that the goods in question, which then belonged to the wife, should after the marriage continue to belong to her for her sole and separate use. The wife assigned the goods to the claimants by a bill of sale made prior to the execution and duly registered under the Bills of Sale Acts, 1878 and 1882, to which the husband was no party:—

Held, that the bill of sale executed by the wife was valid under the Bills of Sale Acts, and that the claimants were entitled to the goods as against the execution creditors.

Chapman v. *Knight* (5 C. P. D. 308) discussed.

APPEALS from county court.

These were interpleader issues in a county court, for the purpose of trying the title to certain goods taken in execution as between the execution creditors and the claimants.

In the action *Walrond* v. *Goldmann*, the plaintiff had obtained judgment against the defendant Goldmann, and in the action *Mills Brothers* v. *Goldmann and Wife*, which was upon a promissory note made by the defendants jointly, the plaintiffs had obtained judgment against the defendants Goldmann and his wife. Execution having issued on both the judgments, the goods in question, consisting of household furniture, were seized under the executions at the house where the husband and wife resided. They were claimed by the Real and Personal Advance Company under a bill of sale executed by the defendant Mrs. Goldmann prior to the executions. It appeared that the goods in question had belonged to Mrs. Goldmann before her marriage, and that before such marriage took place in 1881, a deed dated the 7th of June, 1881, had been executed by Goldmann, his wife, and one Simon Cohn, described therein as a trustee appointed by the wife, by

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which it was witnessed that it was declared and agreed between all the parties that, if the intended marriage should take place, all the real and personal property to which the wife at the time of the said intended marriage, or she or her husband in her right at any time or times during the intended coverture, should be or become entitled for any estate or interest, and more particularly described in the schedule thereto, whether in possession, reversion, or otherwise, should belong to the wife for her sole and separate use and be at her absolute disposal as if she were a feme sole. The deed contained, however, no assignment of the goods to Simon Cohn. By the bill of sale, which was dated the 29th of April, 1885, Mrs. Goldmann assigned to the claimants, the Real and Personal Advance Company, the goods in question as security for an advance. Such bill of sale was in the form required by and was duly registered under the Bills of Sale Acts, 1878 and 1882. The husband was not a party to this assignment. The county court judge held the bill of sale invalid, on the ground that the husband as trustee in equity ought to have been a party to the assignment, and decided in favour of the execution creditors in both cases.

A rule nisi had been obtained on behalf of the claimants to set the judgment of the county court judge aside, and to enter judgment for the claimants in both cases,

C. J. Peile, for the execution creditors in both cases, shewed cause. There was no assignment of the goods to any one in the settlement executed prior to the marriage, and, therefore, on the marriage the property in the goods vested in the husband.

[CAVE, J. The effect would be that the husband would in equity be a trustee for the wife.]

Admitting that to be the case, the bill of sale was executed by the wife only, the husband being in apparent possession of the goods, and there is no concurrence in the deed by the husband. It is submitted, on the authority of *Chapman* v. *Knight* (1), that a bill of sale, executed under such circumstances by a person having the equitable estate only, is invalid under the Bills of Sale Act as against execution creditors.

(1) 5 C. P. D. 308.

The provisions of the Bills of Sale Acts of 1870 and 1882 appear to contemplate that the person granting the bill of sale should be the true owner of the property in the goods, and in apparent possession of them: see per Grove, J., in *Chapman* v. *Knight*. (1) An assignment of the goods by a cestui que trust alone cannot be good under the Act; at any rate where the goods are in the apparent possession of the trustee, otherwise the policy of the Act would be entirely defeated in such a case as this. The goods are in the apparent possession of the husband, the trustee, and on searching the register creditors would find no assignment by him. It is not disputed that the claimants could have called on the husband to complete their title by executing an assignment to them, but it is too late to do so now.

[CAVE, J. The husband never had any beneficial interest in the goods. How can they be subject to execution on the judgment against him alone?]

It is submitted that at any rate they are liable to execution on the judgment against the husband and wife jointly: *Taylor* v. *Meads*. (2)

Firminger, for the claimants, in support of the rule, was not called upon.

CAVE, J. I am of opinion that this appeal must be allowed and judgment entered for the claimants. The case seems to me a very simple one. The husband before the marriage, by the indenture of the 7th of June, 1881, agreed that certain property to which his intended wife was entitled should after the marriage belong to her for her sole and separate use. That appears to me to be a perfectly good instrument, and it operated to prevent the goods from ever becoming the husband's. It is therefore clear that as they never were his they could not be seized on a judgment against him alone. That disposes of one of the cases.

But it is argued that, although the goods could not be seized as against the husband alone, yet they might be seized as against the wife on the judgment against her and the husband jointly. Now either the goods were in her possession or they were not.

(1) 5 C. P. D. 314. (2) 34 L. J. (Ch.) 203.

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If they were not then the Bills of Sale Act does not apply. If they were in her possession, it is clear that before the execution she had executed a document by which she assigned to the claimants at any rate the equitable, and I am disposed to think the legal, interest in the goods, and that document was duly registered under the Bills of Sale Acts. Those Acts only avoid an assignment of goods by an unregistered bill of sale, where the former owner, notwithstanding the assignment, retains the possession and apparently the ownership of the goods. Now in this case, the husband never was the owner; and, although the wife had an equitable interest under the deed of the 7th of June, 1881, and had assigned that interest before the execution was levied, yet the assignment was duly registered, and consequently is not avoided by the Bills of Sale Acts.

WILLS, J. I am of the same opinion. The case of *Chapman* v. *Knight* (1) was decided on sections of the Bills of Sale Act, 1878, which have since been repealed, and I do not think that case is any guide with regard to the present case.

Appeal allowed.

Solicitor for claimants: *Edward Kinns.*

Solicitors for execution creditors: *Layton, Son, & Lendon.*

(1) 5 C. P. D. 308.

E. L.

BROWN & CO. *v.* WATKINS & CO. AND BLYTH & CO.

1885
Dec. 4.

Practice—Discovery of Documents from co-Defendant—Rules of Court, 1883, *Order XXXI., r.* 12.

The plaintiff made in the same action claims against two defendants, the claim against one defendant being in respect of the alleged breach of a certain stipulation of a contract, and the claim against the other defendant being an alternative claim for negligence by him as agent in effecting a contract without such stipulation contrary to instructions:—

Held, that one of such defendants could not obtain discovery of documents in the action from the other, Order XXXI., r. 12, only providing for discovery between opposite parties.

APPEAL from an order of a judge at chambers.

The facts were as follows:—

The plaintiffs claimed against the two defendant firms alternatively. Their case, as appearing from the statement of claim, was in substance as follows: they stated that they had, through the defendants Blyth & Co. as their agents, effected a contract with the defendants Watkins & Co. for the building and supply by Watkins & Co. to them of a steam tug; that it was a term of the contract that the said tug should be capable of steaming at a rate of thirteen knots an hour; that they had paid by way of deposit a certain portion of the price of the tug in advance; and that the tug when delivered proved to be unable to steam at the rate of thirteen knots an hour. The plaintiffs claimed against the defendants Watkins & Co. to be entitled to reject the tug and recover the deposit paid. They further stated alternatively that the defendants Watkins & Co. denied that the defendants Blyth & Co. had made it a term of the contract that the tug should be capable of steaming thirteen knots an hour; that they had employed the defendants Blyth & Co. as agents to effect the contract for reward; and that they had instructed them to make it a term of the contract that the tug should be capable of steaming at that speed, and they claimed alternatively against Blyth & Co., if they had not done so, for negligence as agents in not effecting a contract that the tug should be capable of that speed. The defendants Watkins & Co. applied to a master at chambers for an order for discovery of documents against the plaintiffs and the

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defendants Blyth & Co. The master refused the application so far as the defendants Blyth & Co. were concerned, but the judge at chambers on appeal reversed the decision of the master and made an order for discovery of documents by Blyth & Co. Against this order Blyth & Co. appealed.

Gorell Barnes, for the defendants Blyth & Co. A defendant has never before been ordered to make discovery of documents to another defendant. It is submitted that the rules give no power to make such an order. The case turns on the construction of Order XXXI., r. 12. Order XXXI. relates to discovery both by interrogatories and otherwise. It is clear on the terms of the rules of the order which relate to interrogatories (rules 1–11) that one defendant could not interrogate another, the power of administering interrogatories being only as between opposite parties. It is true that the phraseology of the rules as to discovery of documents is slightly different, the words "any party" and "any other party" being used, but it is contended that it was not meant by those terms to give a right to discovery by one defendant to another defendant. In rules 1 and 4 of Order XXXII. which relate to obtaining admissions before trial, and which must of necessity be confined to opposite parties, similar words are used. No cases are to be found in the Court of Chancery where such discovery as this has been granted. [He cited *Molloy* v. *Kilby* (1); *MacAllister* v. *Bishop of Rochester* (2); *Wynne* v. *Humberston* (3); *Attorney-General* v. *Clapham*. (4)]

Macrae, for the defendants, Watkins & Co. There is a marked distinction between the language of rules 1 to 11 of Order XXXI. which relate to interrogatories, and that of rule 12, which relates to discovery of documents, and the change of language must have been made intentionally. Sect. 100 of the Judicature Act, 1873, defines "party" as including any person served with notice of or attending any proceeding, though not named on the record.

[MATHEW, J. Why should there be such a distinction as is contended for between interrogatories and discovery of documents? The suggested alteration of the practice may lead to

(1) 15 Ch. D. 162.
(2) 5 C. P. D. 194.
(3) 27 Beav. 421, 424.
(4) 10 Hare, App. lxviii.

somewhat formidable consequences. The result may be that plaintiffs will be delayed while the defendants are fighting inter se as to discovery of documents.]

That would be the result of the plaintiffs' own act in making alternative and inconsistent claims against two defendants. It would be a matter of discretion in each case whether such an order should be made. The interests of the defendants are adverse in this case. It is the interest of the defendants Blyth & Co. to attempt to throw the liability on the defendants Watkins & Co., and it is just that the latter should have the discovery of documents they ask for in order to defeat such an attempt. The intention of the Judicature Acts was to simplify proceedings and to settle all matters between the parties as far as possible in the same proceeding. It would be contrary to that intention that one defendant should be driven to bring a separate action for discovery against the other. [He cited *Quilter* v. *Tod-Heatley*. (1)]

Gorell Barnes, in reply.

MATHEW, J. I am of opinion, though not without doubt, that this order must be set aside on the ground that there was no jurisdiction to make it. It is admitted that every one of the rules relating to interrogatories in Order XXXI. (which relates both to discovery by interrogatories and discovery of documents), refers only to interrogatories to be administered to the opposite party. But when we come to rule 12 of the order we find that the words are: "Any party may without filing any affidavit apply to a Court or judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein." It is argued, therefore, that, although under the earlier rules of the order one defendant could not interrogate another, the change of language in the rules relating to discovery and production of documents shews that discovery of documents was intended to stand on a different footing, and that one party can have such discovery from another, though they are not opposite parties. I asked counsel in the course of the argument

(1) 48 L. T. 373.

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whether he could suggest any reason for making this distinction between interrogatories and discovery, but he did not appear to me to be able to suggest any good reason. I cannot think that there was any intention to make any such difference, or that the words "any other party," in rule 12 were intended to mean anything but the "opposite party" referred to in the rules relating to interrogatories. I am confirmed in that view by the forms relating to discovery in the appendices to the rules, which all seem framed to meet the case of discovery from opposite parties. Furthermore, on looking at Order XXXII., rr. 1 and 4, it will be found that precisely similar words are used to those in Order XXXI., r. 12, viz. "any party" and "any other party," and yet it is obvious that in those rules only opposite parties can be meant. It was said that the granting of the order between co-defendants was a matter of discretion, but there are no provisions in the rules indicating the principle upon which such a discretion is to be exercised in the case of co-defendants, such as one would have expected to find if the rules had contemplated any distinction in this respect between discovery from opposite parties and discovery from other parties. The object of seeking discovery from co-defendants in most cases could hardly be to procure evidence in the cause; it would be more likely to be sought for the purpose of procuring evidence to be used in some subsequent litigation. The result in many cases would be that the plaintiff's action might be delayed while the co-defendants were fighting between themselves as to discovery of documents. It seems to me that the whole of the rules contained in Order XXXI. are intelligible and homogeneous on the supposition that "party" means opposite party. For these reasons I think that the learned judge at chambers was wrong in making this order, and that it should be rescinded.

SMITH, J. I must confess to feeling considerable doubt as to the meaning of the rules on this subject, but on the whole I come to the conclusion that the learned judge was wrong in making this order. My reasons are these. It is conceded that before the making of Order XXXI., r. 12, a defendant could not have obtained in the action such an order for discovery as this against

a co-defendant. That being so, I do not think that, taking the words of rule 12 as they stand by themselves, there would be much difficulty in reading them as referring to opposite parties only, and I am fortified in that view by the language of Order XXXII., r. 4, where the same phraseology is used; for in that rule only opposing parties can be meant. So far one would be of opinion that the intention of the rule was only to give the same power of obtaining discovery that existed before, and that discovery as between opposite parties only was contemplated; but then we are met by the difficulty that "party" is defined by the interpretation clause (Order LXXI., r. 1), which applies to the rules the interpretations contained in the Judicature Act, 1873, s. 100. It is by that section provided that "'party' shall include any person served with notice of or attending any proceeding though not named on the record." It is to be observed, however, that the interpretation only applies "unless there is anything in the subject or context repugnant thereto," and this difficulty may perhaps be got over on the ground that reading Order XXXI., r. 12, by the light of Order XXXII., r. 4, it sufficiently appears that, though "party" may sometimes include any other party, in that rule it means opposite party. But then I come to a matter which has certainly given rise in my mind to considerable difficulty: whereas the framers of the rules use in all the rules relating to interrogatories expressions indicating opposite parties, when we come to the rules relating to discovery of documents the language changes, and the expressions "any party" and "any other party" are used. I have great difficulty in seeing how that came to be done unless there was some meaning in the change of the language. These rules were drawn with very great care, and it would hardly seem as if such a change could have been made unintentionally. On the whole, however, I have arrived at the conclusion that the rule does not authorize granting discovery as between these co-defendants.

Order rescinded.

Solicitors for defendants Blyth & Co.: *Stibbard, Gibson, & Co.*
Solicitors for defendants Watkins & Co.: *Lowless & Co.*

E. L.

1885
Dec. 9.

[IN THE COURT OF APPEAL.]

EX PARTE HARRIS.

Landlord and Tenant—Distress for Rent—Lodgers' Goods, Protection of—34 & 35 Vict. c. 79, ss. 1, 2—Declaration by Lodger—Absence of Statement that Declarant is a Lodger, and whether or no Rent is due.

A declaration made by a lodger under 34 & 35 Vict. c. 79, s. 1, did not state that the declarant was a lodger, and whether or no any rent was due from the lodger to her immediate landlord, no such rent being in fact due:—

Held, that such declaration was nevertheless sufficient, on the ground that the Act does not require it to be stated that the declarant is a lodger, and that the declaration stating nothing about rent must be treated as importing that no such rent was due.

APPEAL from the refusal of the Queen's Bench Division to grant a rule nisi for a certiorari to bring up an order for restoration of goods made by justices under the 2nd section of 34 & 35 Vict. c. 79.

The facts were in substance as follows:—

The appellant Harris had distrained for rent in arrear upon premises let by him to one William Bevan. Some of the goods included in the distress were claimed by one Clara Bevan, a lodger, under 34 & 35 Vict. c. 79. A declaration was accordingly served upon Harris by her with regard to the said goods under the 1st section of that Act.

The declaration was addressed to Harris, and declared that William Bevan had no right of property or beneficial interest in the furniture, goods, and chattels, of which an inventory was annexed, but that such furniture, goods, and chattels were the property of the declarant. It contained no statement that the declarant was a lodger, and no statement whether or not any rent was due from the declarant to her immediate landlord.

Harris, notwithstanding such notice, proceeding with the distress as to the goods claimed by the declarant, she thereupon made an application to justices under the 2nd section of the Act for the restoration of the goods. At the hearing, it appeared that no rent was due from the declarant to William Bevan.

The justices made an order for the restoration of the goods by Harris to Clara Bevan.

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EX PARTE HARRIS.

A motion was made in the Queen's Bench Division on behalf of Harris for a rule nisi for a certiorari to bring up the order of the magistrates on the ground that it was made without jurisdiction, the declaration of the lodger not being in accordance with the provisions of the Act. The Queen's Bench Division refused to grant a rule. (1)

Attenborough, moved by way of appeal for a rule nisi for a certiorari. The declaration of the lodger was insufficient, first, because it did not state that the declarant was a lodger; and secondly, because it did not state anything with regard to rent. The Act requires that it should state whether any rent is due.

(1) The 1st section of 34 & 35 Vict. c. 79, provides that, if any superior landlord shall levy or authorize to be levied a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, &c., so distrained or threatened to be distrained upon, and that such furniture, &c., are the property of or in the lawful possession of the lodger; and also setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff, &c., the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord: and to such declaration shall be annexed a correct inventory subscribed by the lodger of the furniture, &c.; and if any lodger shall make or subscribe such declaration and inventory knowing the same or either of them to be untrue in any material particular he shall be deemed guilty of a misdemeanor.

The 2nd section provides that, if any superior landlord, or any bailiff, &c., after being served with the beforementioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, &c., the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, &c., of the lodger, such superior landlord, bailiff, &c., shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or two justices of the peace in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just; and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into.

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These particulars are required in order that the landlord may know how to proceed, and to inform him of the facts which would under the Act make proceeding with the distress illegal. This declaration merely states, without stating that the declarant is a lodger, that the goods are the property of the declarant, which is quite consistent with the landlord's right to proceed with the distress. The lodger might purposely abstain from stating that rent is due and the landlord would be placed in a position of great difficulty. A sufficient declaration under the Act is a condition precedent to the jurisdiction of the magistrates to make the order for the restoration of the goods.

[LORD ESHER, M.R. Is it clear that the magistrates have no jurisdiction unless there is a declaration in strict compliance with the Act?]

The landlord had at common law a right to distrain these goods, and it is submitted that in order to defeat that right it is essential that the requirements of the Act should be strictly fulfilled.

LORD ESHER, M.R. In my opinion it is not necessary to decide whether, if the declaration were insufficient, the magistrates would have no jurisdiction, because it seems to me that the declaration in this case is sufficient under the Act. The first defect suggested is that it contains no statement that the declarant was a lodger. I do not think that any such statement is required by the Act. The 1st section of the Act sets forth what the declaration is to contain, and no assertion is required that the declarant is a lodger. Then it is suggested that the declaration is bad because it does not say that there was no rent due. That question depends on the true construction of the words of the section, "also setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord." If no rent is due, it is clear that the declaration cannot state for what period any rent is due. That seems to me to shew that the proper reading of the provision is that the declaration is to state what rent, if any, is due, and for what period. That being so, it is not necessary, if no rent is due, that the declaration should in terms say so. A declaration not setting forth that any rent is

due must be read as stating that no rent is due. Then, if before the magistrates it appeared that rent was due, the declaration would be proved to be untrue, and the effect of that might be that the application would fail upon the evidence, not for want of jurisdiction. It seems to me therefore that the declaration is correct in point of form, and it is unnecessary to decide whether, if it had been inaccurate, the jurisdiction of the magistrates would have been ousted.

COTTON, L.J. I agree. There is nothing in the Act which points to the conclusion that the declaration must state that the declarant is a lodger. He must no doubt in fact be a lodger in order that the Act may apply, but all we have to deal with now is the sufficiency or otherwise of the declaration. As to the other point, I think, looking at the words of the section, that the construction put upon it by the Master of the Rolls is correct, and that the true effect of a declaration which does not say that any rent is due is that it imports that no rent is due.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors for applicant: *Frith Needham, for R. Urry.*

E. L.

1885
Dec. 11.

[CROWN CASE RESERVED.]

THE QUEEN *v.* WEBSTER.

Criminal Law—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 6 —*Suffering Girl under Sixteen to be on Premises for the Purpose of being carnally known.*

The prisoner was convicted under the 6th section of the Criminal Law Amendment Act, 1885, of knowingly suffering a girl under sixteen to be on premises for the purpose mentioned in that section. The girl in question was the prisoner's daughter, and the premises in respect of which the charge was made were her home where she resided with the prisoner:—

Held, that, notwithstanding the above-mentioned circumstances, the conviction was good.

CASE reserved by Denman, J., the facts of which were in substance as follows:—

At the Autumn Assizes, 1885, for the town of Nottingham, Rebecca Webster was indicted under 48 & 49 Vict. c. 69, s. 6, for that she being the occupier of premises mentioned unlawfully and knowingly did suffer one Eliza Ann Webster, then a girl of above the age of thirteen and under the age of sixteen years, to resort to and be in and upon such premises for the purpose of being unlawfully and carnally known by a certain man mentioned.

Eliza Ann Webster, mentioned in the indictment, was a girl of the age of fourteen, and was known to be of that age by the prisoner, whose illegitimate daughter she was. She lived in the prisoner's house as part of the prisoner's family, and had no other home. There was no evidence that any man had been in the prisoner's house before the night of the 11th of September, 1885. On that night, about 11 P.M., Eliza Ann Webster was seen in company with a man in a public-house, and afterwards walking with him in the street by a policeman, who lost sight of them for a time but afterwards entered the house of the prisoner, at about twelve o'clock at night, and found the prisoner sitting in a lower room talking to two men. He asked the prisoner, "who was up-stairs?" and the prisoner answered, "only my daughter." The policeman thereupon went up-stairs and found Eliza Ann

Webster in bed with the same man with whom he had first seen her. The man came down, and took his shoes from under a chair directly opposite the place where the prisoner was sitting, and swore, after being cautioned, that he had placed them there before going up-stairs, in the prisoner's sight, and that he and Eliza Ann left the room together and went upstairs in the prisoner's sight.

The prisoner's counsel submitted that there was no evidence of a resorting to or being in or upon the premises for the purpose mentioned in the Act, inasmuch as the girl was merely there because it was her home, and that the Act was not intended to cover the case of a single isolated visit.

The learned judge told the jury that, if they were satisfied that the girl being, to the prisoner's knowledge, only fourteen years old, went upstairs with the man for the purpose of his having connection with her, and the prisoner knew this and made no objection to it, they might find the prisoner guilty in the absence of any proof of any previous misconduct of the girl. The jury found the prisoner guilty. The question for the Court was whether there was evidence of an offence under 48 & 49 Vict. c. 69, s. 6, and whether the above ruling was correct.

Horace Smith, for the prisoner. It is submitted that this case is not within 48 & 49 Vict. c. 69, s. 6. The girl lived with her mother, and was on the premises because she lived there. The section is aimed at cases where a person who occupies premises keeps girls on the premises or suffers them to resort to the premises for the purposes of prostitution. It was not aimed at a case where a girl under sixteen living with her mother is guilty of immorality in the mother's house without objection by the mother. The mother could not turn her child out of the house; she cannot be said to have suffered the child to be on the premises for the purposes of prostitution; she suffered her to be on them as her home because she lived there.

[LORD COLERIDGE, C.J. She suffered her to be on the premises at the particular time for the purposes in question.]

Sect. 12 of the Act is the section that provides for the case of parents guilty of allowing the prostitution of their children.

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THE QUEEN v. WEBSTER.

Stanger, for the prosecution, was not called upon. (1)

LORD COLERIDGE, C.J. I am clearly of opinion that this conviction should be affirmed. The prisoner was indicted under 48 & 49 Vict. c. 69, s. 6, which provides that "any person, who being the owner or occupier of any premises, &c., induces, or knowingly suffers any girl of such age as in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, shall, if such girl is under the age of thirteen years, be guilty of felony, &c., and, if such girl is of the age of thirteen and under the age of sixteen years, be guilty of a misdemeanour, &c." The question is whether the prisoner knowingly suffered the girl in question, being under the age of sixteen, to be on the premises for the purpose mentioned in the section. Upon the facts stated the matter appears to me to be perfectly clear. The case comes exactly within the words of the section. The prisoner knew the age of the girl, and she suffered her to be on the premises for the purpose mentioned in the statute, for she knew for what purpose the girl had gone upstairs, and she could have turned her out, or at any rate she could have turned the man out, and so could have prevented the girl being on the premises for that purpose. But it is urged that, though the words are clear, and the facts clearly come within the words, nevertheless the case is not within the meaning of the section. On general grounds I can conceive no reason why this should be so. Those acquainted with the administration of our criminal law know that, unfortunately, the relation of the parent to the child is in many cases most grievously abused in respect of matters within the scope of the Act. It seems to me unreasonable to suppose that this Act was passed without regard to facts well known to those having to administer the criminal law, and that a class of persons who in many cases are likely to come within its purview were intended to be omitted from its provisions. Reliance was placed upon the 12th section in support of the contention for the

(1) The counsel who appeared for the prisoner was, in fact, instructed by the Solicitor for the Treasury, it being desired that the point should be argued and an authoritative decision obtained thereon.

prisoner. That section provides that a father or mother who encourages the prostitution or seduction of a child under sixteen years of age may be deprived of the custody of the child. It was suggested that the only remedy in the case of parent and child was under that section. I cannot see why that should be so. The 12th section may no doubt apply to cases where parents are guilty of the matters specified in the 6th section as well as to other cases which would not come within that section; but it seems to me that the fact that the 12th section may be applicable is no reason for excluding the application of the 6th section. The only ground upon which the case was argued before us is thus disposed of. The other ground for invalidating the conviction suggested in the case admittedly fails. It therefore follows that the conviction must stand.

DENMAN, FIELD, HAWKINS, and WILLS, JJ., concurred.

Conviction affirmed.

Solicitor: *Solicitor for the Treasury.*

E. L.

[CROWN CASE RESERVED.]

Dec. 11.

THE QUEEN *v.* ROBSON.

*Criminal Law — Embezzling Moneys of Copartnership — "Copartnership," Meaning of the Word—*31 & 32 *Vict. c.* 116, *s.* 1*—Association not for Purposes of Gain.*

An association having for its object not the acquisition of gain but the spiritual and mental improvement of its members is not a "copartnership" within the meaning of the term as used in 31 & 32 Vict. c. 116, s. 1. Consequently a member of such an association who has embezzled moneys belonging to it cannot be convicted under the above-mentioned Act of embezzling the moneys of a "copartnership."

CASE reserved by Hawkins, J., of which the facts were as follows:—

The prisoner was tried and convicted at the autumn assizes for the county of Northumberland on the 31st of October, 1885, on an indictment framed under 31 & 32 Vict. c. 116, s. 1 charging that he, being a member of a copartnership called the Bedlington

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Colliery Young Men's Christian Association (hereafter called the association), feloniously did in January, March, and May, 1885, embezzle three several sums of money of and belonging to the said co-partnership.

The only question reserved for the consideration of the Court was whether the association was a co-partnership within the meaning of the section above referred to. If it were, every other matter necessary to warrant the conviction was to be taken to be established by the verdict of the jury.

The object of the association was, to use the language of one of its printed rules, "the extension of the Kingdom of the Lord Jesus Christ among young men and the development of their spiritual life and mental powers." It was composed of members and associates. The number of members did not exceed twenty. Any person was eligible for membership "who gave decided evidence of his conversion to God," but, before he could become a member, he must be proposed and seconded by two members of the association and elected by the committee on their being satisfied as to his suitability. Trustees for the time being in whom the real property belonging to the association was vested became members by virtue of their appointment as trustees. Members were required to subscribe three shillings per annum. It was not material to consider the qualification or status of associates. The affairs of the association were in the hands of a general committee of management, consisting of a president, two vice-presidents, a treasurer, two secretaries, and at least nine members. The committee had power to suspend or expel any member whose conduct was found inconsistent in their judgment with the Christian character. The agencies for the attainment of the objects of the association were, 1st, the personal efforts of the members; 2nd, devotional meetings; 3rd, social meetings; 4th, classes for Biblical instruction; 5th, the delivering of addresses and lectures; and, 6th, the diffusion of Christian and other suitable literature.

Before the first of the offences charged against the prisoner was committed, the members of the association proposed to build and afterwards built a hall or place of meeting for the purposes of the association at a cost of nearly 200*l.*, of which about 40*l.*

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was still owing. To this building every member had the right of entry and was entitled to a latchkey.

The prisoner became a member of the association in 1878, and had continued to be a member up to the time of the trial. As and being such member he solicited and obtained for the association from divers persons many sums of money as donations or subscriptions on account of and for the general purposes of the association, towards the building fund, and towards the liquidation of the aforesaid debt of 40*l*. Three of these sums it was that the prisoner was charged with and found guilty of embezzling.

If the association was a copartnership within the meaning of 31 & 32 Vict. c. 116, s. 1, the conviction was to stand affirmed. If on the contrary it was not the conviction was to be reversed. (1)

Walton, for the prisoner. The only question is whether this association is a copartnership. The terms of the statute clearly shew that the copartnerships contemplated thereby are copartnerships in the ordinary sense of the term, viz., for the purposes of gain or profit. Lindley, L.J., in his work on Partnership, p. 1, gives an explanation of the term "partnership," which shews that the necessary idea of a partnership is that it should have for its object the acquisition and division of gain. He says: "Without attempting to define the terms 'partners' and 'partnership,' it will suffice to point out as accurately as possible the leading ideas involved in these words. The terms in question are evidently derived from *to part* in the sense of to divide amongst or share; and this at once limits their application, although not very precisely: for persons may share almost anything imaginable, and may do so either by agreement or otherwise. But, in order that persons may be partners in the legal acceptation of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that

(1) 31 & 32 Vict. c. 116, s. 1, provides that "if any person, being a member of any copartnership, or being one of two or more beneficial owners of any money, goods, or effects, &c., shall steal or embezzle any such money, goods, or effects, &c., of or belonging to any such copartnership or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership or one of such beneficial owners."

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which they have agreed to share shall be the profit arising from some predetermined business engaged in for their common benefit; . . . . to use the word 'partnership' to denote a society not formed for gain is to destroy the value of the word, and can only lead to confusion. Nor is it consistent with modern usage. Lord Hale and older writers use copartnership in the sense of co-ownership, but this is no longer customary, and, as will be shewn hereafter, there are many important differences between the two."

This is not an association for the purposes of profit or gain.

[LORD COLERIDGE, C.J. The only point reserved is whether this is a copartnership. The prisoner was not indicted as one of several joint beneficial owners.]

No counsel appeared for the prosecution.

LORD COLERIDGE, C.J. It seems to me that this conviction cannot be supported. I cannot find any authority throwing any doubt on the accuracy of the passage in Lindley on Partnership, which makes the participation in profits essential to the English idea of partnership, and states that, although in former times the word "copartnership" was used in the sense of "co-ownership," the modern usuage as been to confine the meaning of the term to societies formed for gain. A number of definitions given by writers from all parts of the world are appended to the passage, and in all of them the idea involved appears to be that of joint operation for the sake of gain. The association in the present case is not a copartnership in any sense of the word into which the notion of co-operation for the purpose of gain enters. We must construe the word "copartnership" as used in the Act according to the meaning ordinarily attached to it by the decisions and text-books on the subject. This association does not come within that meaning. The only point reserved for us is whether this association is a copartnership within the Act. Inasmuch as we are of opinion that it is not, the conviction must be reversed.

DENMAN, J. I am of the same opinion. The word "copartnership" in the Act must be construed according to the well-known legal meaning of the term. If the section had only

mentioned the case of a copartnership I should have thought it impossible to say that this case was within the statute. The conclusion to which we come is, in my opinion, much strengthened by the fact that the section contains another expression which covers the case of co-ownership where there is no copartnership. Here we are dealing only with the term "copartnership," for the only question reserved is whether this association was a copartnership within the section. I am clearly of opinion that it was not.

FIELD, HAWKINS, and WILLS, JJ., concurred.

Conviction reversed.

Solicitor for prisoner: *T. Cray, for Dix & Warlow.*

E. L.

[CROWN CASE RESERVED.]

Dec. 11.

THE QUEEN *v.* BURGESS.

Criminal Law—Compounding a Larceny, who may be guilty of—Agreement not to prosecute by Person not Owner of Goods stolen — Indictment for compounding Felony, what essential in.

An indictment for compounding a felony need not allege that the defendant desisted from prosecuting the felon.

The offence of compounding a larceny may be committed by a person other than the owner of the goods stolen or a material witness for the prosecution.

CASE reserved by the Recorder of London, the facts of which were in substance as follows:—

At the last July sessions of the Central Criminal Court the prisoner was arraigned on an indictment which was, so far as material, as follows:—

It stated that one Arthur Bagley feloniously stole certain money to the amount of 28*s.* of Henry Bedford, and that the prisoner "well knowing the said felony to have been done and committed by the said Arthur Bagley as aforesaid, and contriving and intending to prevent the due course of law and justice, and to cause and procure the said Arthur Bagley for the felony aforesaid to escape with impunity, afterwards, to wit, on the 5th day

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of July, 1885, unlawfully and for gain's sake did compound the said felony with the said Arthur Bagley, and did then exact, take, receive, and have from the said Arthur Bagley the sum of 28*s.* for and as a reward for compounding the said felony, and desisting from prosecuting the said Arthur Bagley, and for procuring that the said Arthur Bagley should not be prosecuted for the felony aforesaid, to the great hindrance of justice in contempt of our said Lady the Queen &c."

Before plea pleaded, the prisoner's counsel moved to quash the indictment on the ground that, though it professed to charge the prisoner with the offence of compounding a felony, it did not in fact disclose any offence, there being no allegation that the prisoner desisted from prosecuting the felon, which, he contended, was a material part of the offence of compounding a felony, and that, if after receiving money from the felon as an inducement not to prosecute the prisoner had in fact prosecuted, no offence would have been committed, and he cited *Rex* v. *Stone and Others.* (1)

For the prosecution it was contended that the offence consisted in the corrupt agreement not to prosecute. The recorder declined to quash the indictment, and the prisoner pleaded not guilty. The case proceeded, and it was proved that the prisoner was employed to levy a distress for two weeks' rent, amounting to 28*s.* upon the goods of a Mr. Bedford, and that upon that occasion Arthur Bagley, whilst in possession as the prisoner's assistant, stole the sum of 28*s.* belonging to Mr. Bedford from a drawer in Bedford's room, and absconded. The prisoner was informed of this fact by Bedford, and urged Bedford to put the matter into the hands of the police, but Bedford told prisoner he would leave it in his hands, and the prisoner on the 3rd of April gave information of the theft to the police. The prisoner on the 11th of June entered into communication with the stepfather and the mother of Arthur Bagley, and suggested to the mother that she should send her son to see him and compromise with him, as Mr. Bedford was willing to take the money by instalments, weekly or anyhow he could pay it, and then he (Bagley) would be perfectly free; and eventually he handed to the mother a

(1) 4 C. & P. 379.

paper in the following terms: "I, W. H. Burgess undertake not to charge Arthur Bagley with any criminal case that I have now against him on the money being provided to pay what he took from Peckham Road while in possession, viz., 30*s*. W. H. Burgess."

On the 5th of July the step-father went with Arthur Bagley to the prisoner's house and paid him 1*l*., which he told him he had received from Arthur Bagley, and at the same time signed and gave to the prisoner an I. O. U. for five shillings, which the prisoner wrote out, and the prisoner thereupon wrote a receipt at the foot of the paper above referred to in the following words: "Received the sum of 30*s*. as stated above." The prisoner then told Bagley he was a free man, and that things were all right, as he had paid the money. Bagley afterwards paid five shillings to the wife of the prisoner and got back the I. O. U. On the 14th of July, Bagley was arrested by the police upon the information of the offence and the description of him which had been given by the prisoner in April, and upon the evidence of Mr. Bedford he was convicted summarily before the magistrate. At the close of the case for the prosecution, the prisoner's counsel submitted that there was no case to go to the jury, on the ground that the owner of the property stolen or a person whose evidence should be necessary to convict the thief are the only persons who can compound a larceny, and that in this case the prisoner was not a necessary witness on the trial of Bagley, and that therefore his undertaking not to charge Bagley with a criminal offence could not impede the course of justice. The recorder overruled the objection, and the jury found the prisoner guilty. The questions for the Court were whether the indictment was bad on the face of it as not disclosing any offence at law and ought to have been quashed; and, secondly, whether there was evidence to be left to the jury against the prisoner upon the indictment.

Burnie, for the prisoner. First, the indictment was bad, because it did not allege that the defendant did desist from prosecuting the offender. Secondly, the evidence did not prove the ofience of compounding a larceny for which the prisoner was indicted.

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The indictment merely alleges an agreement to desist from prosecuting. It is quite consistent with the allegations of the indictment that the defendant did actually prosecute the offender. It is submitted that the mere agreement not to prosecute does not amount to the offence of compounding a felony: *Rex* v. *Stone*. (1)

The defendant may possibly have been guilty of a misdemeanor at common law in the nature of misprision of felony, but it is submitted that it is essential to the offence of compounding a felony that the felony should have been, in fact, compounded, and that the defendant should have actually desisted from prosecuting. The mere agreement to compound is not sufficient.

[HAWKINS, J. When do you say the offence is complete?]

If the felon has not been prosecuted by the defendant up to the time of the finding of the bill against the defendant by the grand jury, there may be a complete offence.

[LORD COLERIDGE, C.J. By many statutes the mere agreement to compound an offence is made an offence.]

Here the offence, being a common law offence, must be governed by the ancient precedents on the subject, which shew what constituted the offence at common law.

Secondly, the offence of compounding a larceny with which the defendant is charged can only be committed by the owner of the goods, or at any rate by such owner or some witness material to the prosecution. The offence is called by the older authorities "theft-bote," and consists in agreeing to desist and desisting from the prosecution of the thief in order to get back the stolen property. The authorities all speak of this offence as though it could only be committed by the owner of the goods.

Lord Coke, in 3rd Institute, p. 134, says of theft-bote: "This offence is more than misprision of felony, for that is not a concealment of his bare knowledge only: but theft-bote is where the owner not only knows of the felony but taketh of the thief his goods again or amends for the same to favour or maintain him, that is, not to prosecute him to the intent that he may escape.... The punishment of theft-bote is ransom and imprisonment, and seeing that the punishment of theft-bote, which is greater than

(1) 4 C. & P. 379.

concealment of felony, is but ransom and imprisonment, it standeth with reason that the punishment of misprision of felony should be but fine and imprisonment."

Blackstone in his Commentaries says: "Of a nature somewhat similar to the two last is the offence of theft-bote, which is where the party robbed not only knows the felon but also takes his goods again or other amends upon agreement not to prosecute." See also Hawkins's Pleas of the Crown, pp. 73, 74; Russell on Crimes, 5th ed., vol. i., p. 292; 2 Chitty's Criminal Law, 1st ed. p. 220. The defendant here was not the owner of the money stolen. He was not even a material witness for the prosecution, for the thief was convicted without his evidence. It was just as if a man in the street having nothing whatever to do with the matter had agreed not to prosecute.

[HAWKINS, J. It is stated that the owner of the money said that he would leave the matter in the defendant's hands.]

It is submitted that he could not put the defendant in his place for this purpose.

[FIELD, J. Suppose the owner of stolen goods were to instruct a solicitor to prosecute and the solicitor compounded the larceny.]

It is submitted that this being a common law offence must be defined by the ancient precedents. In order to make out that the offence at common law has been committed it is not sufficient to shew that facts exist which would produce a mischief analogous to that which is involved in the common law offence. There is really nothing in the case to shew that the owner of the money authorized the defendant to prosecute.

Poland, for the prosecution, was directed to confine his argument to the second point. It cannot reasonably be contended that the only person who can be guilty of compounding a larceny is the owner of the goods. The essence of the offence is the entering by a person in a position to prosecute into a criminal agreement not to put the law in force. Any person cognizant of a crime can institute a prosecution. In this case the thief was in the employment of the defendant, who was to some extent responsible for his acts to the owner of the money, and the defendant, having

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set the law in motion against the thief, then agrees not to proceed with the prosecution. It is submitted that he was clearly guilty of the offence of compounding a felony. [He was then stopped by the Court.]

LORD COLERIDGE, C.J. This case raises two questions, the first being whether this indictment is bad on the face of it, and the second being whether there was any evidence upon the indictment as framed to go to the jury. With regard to the first question, it is admitted that the indictment sufficiently alleged the offence, if the offence is complete without the allegation that the defendant abstained from prosecuting. It is suggested that the indictment is bad because it does not allege that the defendant did abstain from prosecuting. The difficulties in the way of that contention are to my mind enormous. One question which at once arises is when on that view can the offence be said to be complete? A man might conceivably make an illegal agreement not to prosecute and abstain from prosecuting for six years and then might turn round and prosecute after all in breach of the agreement. According to the contention he could not be guilty of the offence because he did ultimately prosecute, and if so it is difficult to see when such an offence can be said to be complete. The way in which one of my learned Brothers put the contention seems to me to be a reductio ad absurdum of the argument. It being admitted that such an agreement is unlawful in the sense that it is not enforceable at law, it is said that, if the maker of it keeps his agreement, he is guilty of an offence, but if, in addition to making such an illegal agreement, he is guilty of the further fraud towards the other party of breaking it, he is guilty of no offence at all. Thus stated the proposition seems to me to be contrary to good sense, and to be a sufficient answer to itself. Then it is said that the offence alleged is the old offence of theft-bote and that no one can be guilty of that offence except the owner of the goods. I do not deny that by some writers, especially by Lord Coke, expressions have been used which may be read so as to afford some countenance to this contention. It seems to me, however, that, when the writers in question so expressed

themselves, it was probably because the question whether the offence could be committed by persons other than the owner of the goods was not then present to their minds, and they were dealing with what would be the case on ninety-nine out of a hundred occasions, viz., the case where the person who was guilty of interfering with the course of justice for his own benefit was the owner of the goods. One can easily see, I think, how it has happened in this way that language has been used which seems to favour to some extent the contention for the defendant, but it must be observed that the writers of the passages to which I refer do not use any negative expression to the effect that the offence can only be committed by the owner of the goods. But, on the other hand, there are not wanting in some of the other authorities indications of the contrary view. The language used by Blackstone in his Commentaries concerning theft-bote seems to me to shew that he can hardly have considered the offence as capable of being committed only by the owner of the goods. I admit that he does not say expressly that it can be committed by another person. But neither, on the other hand, do the writers who have been cited expressly say that it cannot. He says of theft-bote "this is frequently called compounding a felony, and formerly was held to make a man an accessory, but is now punished only with fine and imprisonment. This perversion of justice in the old Gothic constitutions was liable to the most severe and infamous punishment, and the Salic law "latroni eum similem habuit qui furtum celare vellet et occulte sine judice compositionem ejus admittere." This latter portion of what he says on the subject clearly seems inconsistent with the notion that he thought that the offence of compounding the felony could only be committed by the owner of the goods, for it seems to imply that the definition as given by the Salic law was a good definition of the offence of compounding a felony, and that any one was guilty of the offence "qui furtum celare vellet et occulte sine judice compositionem ejus admittere." These expressions seem to me to indicate that there was present to his mind the possibility of the offence being committed by a person other than the owner of the goods. I am of opinion that the defendant upon the facts stated was guilty of the offence of

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compounding a felony, and that therefore the conviction must be affirmed.

DENMAN, FIELD, HAWKINS, and WILLS, JJ., concurred.

Conviction affirmed.

Solicitor for the Crown: *Solicitor to the Treasury.*
Solicitor for defendant: *J. W. Bilton.*

E. L.

Dec. 12.

PRICE, APPELLANT; BRADLEY, RESPONDENT.

Freshwater Fisheries Act, 1878 (41 & 42 *Vict. c.* 39), *s.* 11, *sub-s.* 4—*Exposing Fish for sale in Close Season—Eels caught out of England.*

The 4th sub-section of the 11th section of the Freshwater Fisheries Act, 1878, which forbids the sale or exposure for sale of freshwater fish during the close season, applies to fish caught beyond the limits of that part of the United Kingdom to which the Act applies.

CASE stated by justices, the facts of which were in substance as follows:—

The appellant was summoned before the justices for the borough of Birmingham, under 41 & 42 Vict. c. 39, s. 11, sub-s. 4, for unlawfully exposing for sale during the close season certain fresh water fish, to wit, eels.

At the hearing before the magistrates it was proved that the appellant had exposed for sale certain eels on the 4th day of June, 1885, being then the close season for freshwater fish in England. It was not proved whether the said eels had been caught in salt or fresh water. The magistrates stated that it was admitted, and that they dealt with it as a fact, that eels do at certain periods of the year leave fresh water and travel down into brackish water.

It was proved that the said eels were Irish eels exported from Toome Bridge, county Antrim, and duly invoiced and consigned to the appellant in Birmingham, by whom they were received. At the time when the said eels were caught and exported the catching and sale of them in Ireland were lawful.

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It was contended before the magistrates for the appellant that upon these facts no offence was committed under the Freshwater Fisheries Acts, 1878 and 1884. The magistrates, being of the contrary opinion, convicted and fined the appellant.

The question for the Court was whether the conviction was good. (1)

J. Paterson, for the appellant. Eels are not freshwater fish within the definition given by the Freshwater Fisheries Act, 1878, because they migrate to the sea at certain seasons. The interpretation of "freshwater fish" contained in 47 Vict. c. 11, s. 6, does not apply to the provisions of the Act of 1878. Secondly, the provisions of sub-s. 4 of s. 11 of the Act of 1878 cannot have been intended to apply to fish which are captured out of the part of the United Kingdom to which the Act applies at a time when it was perfectly lawful to catch them.

J. W. Baines, for the respondent. The Freshwater Fishery Acts of 1878 and 1884 are to be read together, and therefore the definition of "freshwater fish" given by the later Act applies to the offences created in the former Act; eels are clearly within that definition.

[THE COURT intimated that in their opinion the finding of the magistrates as to the facts precluded the contention that the eels were not freshwater fish within the definition in the Freshwater Fisheries Act, 1878.]

The words of the 4th sub-section of s. 11 import an absolute prohibition of the sale or exposure for sale of freshwater fish within the close time wherever they may have been caught. In the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), with which

(1) The 2nd section of the Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39) provides that the Act shall so far as is consistent with the tenour thereof be read as one with the Salmon Fishery Acts, 1861 to 1876.

Sect. 3 provides that the Act shall not extend to Scotland or Ireland.

Sect. 11, sub-s. 1, provides that in this section the term "freshwater fish" includes all kinds of fish (other than pollan, trout, and char) which live in fresh water, except those kinds which migrate to or from the open sea, and sub-s. 4 provides that, if any person during the close season buys, sells, or exposes for sale, or has in his possession for sale any freshwater fish, he shall on summary conviction before two justices be liable to a fine not exceeding forty shillings.

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the Freshwater Fisheries Act, 1878, is to be read as one, a distinction is expressly made in this respect between salmon and trout or char. The 19th section of that Act expressly allows the sale in the close time of salmon captured without the limits of the Act where such capture was lawful, whereas no such exception is made by the 20th section in the case of trout or char. It is, therefore, perfectly clear that trout or char captured beyond the limits of that Act could not be sold within the period mentioned by the section. The terms of the enactment now in question are precisely similar to those of the 20th section of the Salmon Fishery Act, 1873, with regard to trout and char. It is quite conceivable that the legislature thought that in order to protect English freshwater fish it was necessary to prohibit in the close time the sale of all freshwater fish, for otherwise the Act might be evaded on the pretext that fish exposed for sale were captured out of England. An analogous provision is contained in the Wild Birds Protection Act, 39 & 40 Vict. c. 29: see *Whitehead* v. *Smithers*. (1)

[He cited also *Etheridge* v. *Woodhouse*. (2)]

J. Paterson, in reply.

MATHEW, J. In my opinion the magistrates were right in convicting the appellant. With reference to the question whether eels are freshwater fish within the meaning of the Act of 1878, the magistrates have merely found that eels at certain periods of the year leave fresh water and travel down into brackish water. It seems to me that, having regard to the terms of the 1st subsection of the 11th section of the Act, which defines the term "freshwater fish" as including all fish (other than pollan, trout, and char) which live in fresh water, except those kinds which migrate to or from the open sea, this finding is equivalent to a finding for the purposes of this case that the eels were freshwater fish. With regard to the other point, the contention is that the prohibition against exposing eels for sale during the close time cannot have been intended to apply to fish that may be caught where the provisions of the Act do not apply.

It was, however, pointed out that the Act is to be read as one with the Salmon Fishery Acts, 1861 to 1876. In the Salmon

(1) 2 C. P. D. 553. (2) Law Rep. 6 C. P. 570.

Fishery Act, 1873 (36 & 37 Vict. c. 71), ss. 19 and 20, a distinction in this respect is drawn between the case of the sale of salmon and that of the sale of certain other fish, viz., trout or char in the close season. In the case of salmon an exception is made with regard to salmon caught beyond the limits of the Act, where the capture of the fish was lawful at the time and place where it was caught, whereas in the case of trout and char no such exception is made. No one could hesitate, upon the terms of those sections, to say that the sale or exposure for sale of trout or char during the period mentioned, wherever they might be caught, was unlawful under the 20th section. When we come to the Freshwater Fisheries Act, 1878, we find a provision with regard to the sale of other freshwater fish in harmony with the provisions of s. 20 of the Salmon Fisheries Act, 1873, and as general in its terms. The 4th sub-section of the 11th section of the Act says that, "if any person during the close season buys, sells, or exposes for sale, or has in his possession for sale, any freshwater fish," he shall be liable to a penalty. The question is whether this provision is to be construed as applicable only to fish caught in that portion of the United Kingdom to which the Act applies? I think not. The words of the section do not of themselves import any such restriction of its applicability, and I can conceive of excellent reasons why it should not be so restricted. A difficult and troublesome inquiry might often be necessary to ascertain whether the fish were caught in England or imported from elsewhere, and this might tend to defeat the object with which the enactment was made. For these reasons I think the conviction must be affirmed.

WILLS, J., concurred.

Conviction affirmed.

Solicitors for appellant: *Mackeson, Taylor, & Arnould, for Bullen Bickley, & Cross.*

Solicitors for respondent: *A. R. & H. Steele, for C. A. Eddowes.*

E. L.

1885
Dec. 14.

PARKINSON *v.* POTTER.

International Law—Ambassador, Immunities of—Attaché of Embassy—Exterritoriality—Parochial Rates—Landlord and Tenant—Covenant by Lessee to pay Rates, Assessments, and Impositions.

A lease of a dwelling-house contained a covenant by the lessee to pay the sewers rate, and all other rates, taxes, assessments, and impositions of what nature or kind soever, and whether parliamentary, parochial, or otherwise, which then were, or at any time thereafter during the term should be, assessed, charged, or imposed upon the demised premises, or on the landlord in respect thereof.

By a local Act relating to parochial rates in the parish in which the demised premises were situated, it was provided that every rate or assessment made, laid, or assessed by virtue of the Act in respect of any land, ground, house, &c., which any ambassador, envoy, resident, agent, or other public minister of any foreign prince or state, or the servant of any such ambassador, envoy, resident, agent, or public minister, or any other person not liable by law to pay such rate or assessment then did or thereafter should inhabit, should be paid by and be recoverable from the landlord, owner, lessor, or proprietor of such land, ground, house, &c.

The lessee of the demised premises assigned the same to an attaché of a foreign embassy who occupied them as his residence. The assignee having claimed exemption from liability to pay a parochial rate made in respect of the premises under the local Act, the parish authorities enforced payment of the same against the lessor.

In an action brought against the lessee by the lessor to recover the amount so paid by him:—

Held, that payment of the rate was not enforceable against an attaché of a foreign embassy; that the rate was therefore under the local Act recoverable from the lessor; and that the lessee was under the covenant bound to repay to the lessor the amount of the rate so paid by him.

Appeal from the Westminster County Court.

The action was by lessor against lessee to recover the sum of 37*l.* 1*s.* 9*d.* as damages for breach of a covenant by the defendant contained in a demise of premises, No. 1 Blandford Square, in the parish of Marylebone, by the plaintiff to the defendant. The covenant was in the following terms:—

"And likewise shall and will from time to time, and at all times during the continuance of the term hereby demised, bear, pay, and discharge the sewers' rate, and all other rates, taxes, assessments and impositions of what nature or kind soever, and whether parliamentary, parochial, or otherwise, which now are, or

at any time hereafter during the said term shall be, assessed, charged, or imposed upon the said messuage, or tenement, and premises hereby demised or intended so to be, or on any part thereof, or on the landlord in respect thereof (except as before excepted)." The exception related merely to landlord's property tax, the reddendum of the lease providing that the rent reserved should be payable without any deduction except such property tax. It appeared that the defendant had assigned the term to one De Basto, the assignment containing covenants by De Basto to perform the covenants of the lease and indemnify the defendant against any breach thereof. By a local Act (35 Geo. 3, c. lxxiii., s. 190) relating to the parish of Saint Marylebone, and providing for the levying of parochial rates therein for various purposes, it was provided that "every rate or assessment which shall be made, laid, or assessed by virtue of this Act for or in respect of any land, ground, house, &c., which any ambassador, envoy, resident, agent, or other public minister of any foreign prince or state, or the servant of any such ambassador, envoy, resident, agent, or other public minister, or any other person not liable by law to pay such rate or assessment now doth or hereafter shall inhabit, shall be paid by and be recoverable from the landlord, owner, lessor, or proprietor of such land, ground, house, &c., who shall be liable and compellable to the payment thereof, and the same shall be recovered and applied as the other rates hereby made payable are to be recovered and applied."

A parochial rate having been made under the above-mentioned Act in respect of the premises demised as aforesaid, De Basto claimed as an attaché of the Portuguese embassy to be exempt from payment of it, and the parochial authorities had thereupon, under the above-mentioned section, compelled the plaintiff, as landlord of the premises, to pay the rate. The action was brought to recover the amount which the plaintiff had been so compelled to pay.

It was proved at the trial in the county court that De Basto resided on the demised premises, and was the Consul General for Portugal. No very direct evidence was adduced of his appointment to the position of an attaché to the Portuguese legation or as to the nature and duties of that position. A clerk from the

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Consulate, however, gave evidence, and stated that he had been frequently at the Portuguese embassy and seen De Basto there: that De Basto was generally addressed there and spoken of as an attaché: that he was there two or three times a week, and was from time to time in communication with the minister: that there was no salary attached to the appointment, but that certain small services were required of attachés: and that De Basto had in fact been employed by the Portuguese minister occasionally to write letters and take messages, and help in the translation of documents connected with the diplomatic work of the embassy. The county court judge found that De Basto was an attaché of the Portuguese legation, and gave judgment for the plaintiff for the amount claimed.

A rule nisi had been obtained to set aside this judgment and enter judgment for the defendant, or reduce the damages to nominal damages on the grounds, first, that the rate paid by the plaintiff was not within the covenant sued upon; and secondly, that the rate was not recoverable as damages, as the plaintiff was not shewn to be legally liable to pay such rate, and that no damage legally recoverable was shewn to have been sustained by the plaintiff.

Dec. 12. *Gainsford Bruce, Q.C.* (*J. Martin Routh*, with him), for the plaintiff, shewed cause. The plaintiff was entitled to recover the amount which he was legally compelled to pay for rates from the defendant upon the covenant in the lease. The effect of the local Act being to throw the rates upon the landlord where the occupier is privileged from payment of them, as De Basto clearly was, the words of the covenant are quite wide enough to cover the case.

[He was then stopped by the Court.]

Charles, Q.C. (*Gore*, with him), for the defendant, in support of the rule. It must be remembered in considering the extent of the privilege, that it is that of the ambassador, not of the servant of the ambassador, and it is therefore confined to those persons who are bonâ fide servants or part of the suite of the ambassador, and consequently essential to the performance of his functions or his convenience and comfort. 7 Anne, c. 12, s. 3, only mentions

domestic servants of the ambassador, but it must be admitted that the privilege applies to persons not strictly speaking domestic servants.

[WILLS, J. That enactment is declaratory of the common law only.]

It is submitted that the privilege must be confined to persons who perform bonâ fide and substantial services for the ambassador: *Fisher* v. *Begrez* (1). There is no evidence here to shew that De Basto was really part of the suite of the ambassador, or performed any substantial services for him. The evidence as to his duties and functions was of the most shadowy character. There is no sufficient evidence that he was an attaché, whatever the position of an attaché may be, and, even if there be, it is submitted that an attaché is not within the privilege. There is no salary attached to the post, and apparently no substantial duties. At any rate it is not shewn that De Basto was in any way essential to the performance of the ambassador's duties, or to his convenience and comfort. Assuming that the attaché, as the servant of the ambassador, would have been privileged from arrest, there is a distinction between the ambassador and a servant of the ambassador with regard to the liability to seizure of goods. In the case of a servant not part of the ambassador's household, and therefore not residing at the embassy but in his own house, the servant's goods are not necessarily privileged as against an execution or a distress for rates: *Novello* v. *Toogood*. (2) The privilege being that of the ambassador not of his servant, it can only exist where it can be shewn that it is claimed in the interests of the ambassador as necessary to the exercise of his functions and his comfort and convenience. Nothing of the kind was shewn here.

[He cited on this point: *Hopkins* v. *De Robeck* (3); *Magdalena Steam Navigation Co.* v. *Martin* (4); *Taylor* v. *Best* (5); *Poitier* v. *Croza* (6); Wheaton's International Law, ed. 1880, p. 282.] If De Basto was not entitled to the privilege it is clear that the plaintiff need not have paid the rate, and cannot recover. 2ndly. The position held by De Basto is not within the terms of

(1) 1 C. & M. 117; 2 C. & M. 240.
(2) 1 B. & C. 554.
(3) 3 T. R. 79.
(4) 2 E. & E. 94.
(5) 14 C. B. 487.
(6) 1 Wm. Bl. 47, 48.

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the 190th section of the local Act, and the case was therefore not one in which the plaintiff was compellable to pay the rate. 3rdly. The case is not within the terms of the covenant. The covenant only applies to assessments and impositions charged on the premises or on the landlord in respect thereof. This is an occupier's rate. It is not charged on the premises or on the landlord primarily.

Gainsford Bruce, Q.C., in reply.

Cur. adv. vult.

Dec. 14. MATHEW, J. In this case the plaintiff, the landlord, has recovered judgment against his lessee for the amount of certain parochial rates assessed on the demised premises which the plaintiff had paid, and which, as he alleged, the defendant had covenanted to repay. A rule nisi was obtained to set aside that judgment and enter judgment for the defendant, on the ground that the evidence did not establish any liability against the defendant.

The facts are as follows: The plaintiff demised a dwelling-house to the defendant, and the lease contained a covenant that the lessee would pay and discharge the sewers rate and all other rates, taxes, assessments, and impositions of what nature and kind soever, and whether parliamentary, parochial, or otherwise, which then were or at any time thereafter should be assessed, charged, or imposed upon the premises or on the landlord in respect thereof. This covenant appears to have been intended to have the widest possible operation, if read by the light of the reddendum, which provides that the rent shall be payable without any deduction except in regard of landlord's property tax. The house so demised was afterwards assigned to De Basto, who undertook to indemnify the defendant against the covenants of the lease. De Basto was alleged by the plaintiff to have become a member of the Portuguese legation, and it appeared that as such he claimed exemption from payment of rates. Certainly the parochial authorities found themselves unable to recover the rates from him, and, accordingly, in pursuance of the provisions of the local Act, they called on the plaintiff as landlord to pay them. He did pay them, and now seeks to recover the amount so paid from the

defendant, his lessee. It was argued by counsel for the defendant that the evidence was not sufficient to shew that De Basto had acquired the privilege claimed by him. In support of that argument our attention was called to the evidence given before the county court judge to prove that De Basto had become a member of the suite of the ambassador. We can only say that on that evidence unanswered it appears to us that the county court judge was warranted in finding that De Basto was an attaché of the embassy. No suggestion was made that there was any want of bona fides in reference to the appointment of De Basto, and, that being so, it seems to us that the evidence not being answered by the defendant was sufficient to entitle the county court judge to come to the conclusion at which he arrived. Then it was urged that, assuming that De Basto was an attaché, it did not follow that he was within the privilege of the embassy; and our attention was called to the provisions of the statute 7 Anne, c. 12, s. 3, which only mentions the ambassador and his domestic servants. But it appears from the authorities that the privilege of the embassy is recognised by the common law of England as forming a part of international law, and according to that law it is clear that all persons associated in the performance of the duties of the embassy are privileged, and that an attaché is within that privilege. I do not think it necessary to refer to *Taylor* v. *Best* (1), and the other cases at length, or to the more recent authorities which my Brother Wills proposes to cite. In *Hopkins* v. *De Robeck* (2) the Court recognised the privilege in the case of a secretary of an embassy, and an attaché seems to come within the same principle. The next question is whether the case came within the provisions of the local Act, and whether, under those provisions, the plaintiff was liable to pay the rates. It does not seem to me on reading the section that there can be any doubt that De Basto came within the terms of it. I think it clear that, if he did not come within any of the previous words, he must come within the words "or any other person not liable by law to pay such rate."

It was said, and there is authority for the assertion, that there are certain charges, amongst which are rates of this description, in

(1) 14 C. B. 487. (2) 3 T. R. 79.

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respect of which it is not usual to set up this privilege, but it is none the less clear that, if the privilege is claimed, the only remedy of the person against whom it is asserted is by appealing to the authorities of the country from which the ambassador is accredited. It seems to me that, upon the true construction of the Act, De Basto comes within its provisions, and that it therefore imposes the liability on the landlord. That being so, the only remaining question is whether the case comes within the provisions of the covenant. It was not very strenuously denied in argument that it did. It seems to me clear that it does, and that the defendant was therefore liable upon the covenant to pay the amount claimed. For these reasons I think the judgment of the county court judge was right, and that the rule must be discharged.

WILLS, J. The plaintiff in this case sues the defendant for parochial rates which he has paid, and which he contends he is entitled to be repaid by virtue of the defendant's covenant with him. The plaintiff is the owner and the defendant the lessee of a house, in respect of the occupation of which the rates were assessed. The defendant has assigned or sublet to Senhor Pinto de Basto, who is said to be an attaché of the Portuguese embassy and who has on that ground refused to pay them. Under a local Act the landlord is liable in such a case; and the first question that arises is whether the person in question was entitled to the immunity which he has claimed.

The evidence that Senhor Pinto de Basto is an attaché to the Portuguese legation is slight, but I think there is evidence of the fact. It seems that he is known at the embassy as an attaché, and is there spoken to and spoken of as an attaché, and treated as an attaché. It seems that there is no salary attached to the post, but that the government of his country can exact from him certain small services; and that he has in fact been employed by the minister occasionally to write letters and to take messages, and to help in the translation of documents connected with the diplomatic work of the embassy, and that he goes often to the embassy and places himself at the disposal of the ambassador.

I think this is evidence upon which the county court judge might fairly find that he was an attaché. If it be once ascer-

tained that he was a person treated at the embassy as a member of the legation, possessing in diplomatic matters more or less of the confidence of the minister and employed from time to time by him in the work of the legation, I think it is not for us to measure the quantum of the services either required from or rendered by him. If there were any reason to suppose that the so-called appointment was a sham, as in a case reported in the books, in which a Christian clergyman was supposed to be domestic chaplain to the ambassador of the Emperor of Morocco; if he were one of an inordinate number of idlers nominally attached to the embassy and not wanted there, or there were any other circumstances from which it might be gathered that the appointment was not bonâ fide, the case would be otherwise. But I can very well understand that, seeing the close connection between diplomatic business and some of the matters which it falls to a consul-general to transact, there may be a convenience in clothing the consul-general with the additional character of an attaché, which may explain and justify his appointment in that capacity, although his services in a diplomatic character may be only slight and occasional.

An attaché is a well known term in the diplomatic service. He forms part of the regular suite of an ambassador. He is classed by Calvo, the author of an elaborate French work on International Law, published in 1880, and written with admirable clearness and with a copiousness of historical illustration which makes his treatise most interesting as well as instructive, along with "Conseillers et Sécrétaires," and he gives a common description of the functions of all three classes of officers as consisting in supporting the minister in all things, in preparing and forwarding official dispatches, in carrying out communications by word of mouth with the public administrative authorities of the country to which the minister is accredited, in classifying and keeping charge of the archives of the mission, in ciphering and deciphering dispatches, in making minutes of the letters which the minister may have to write, and similar services; and he treats the attaché as undoubtedly entitled to all the immunities accorded to the suite of an ambassador: Calvo, International Law, vol. i., p. 486.

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One of these immunities, insisted upon by all writers on International Law with whose works I have any acquaintance, as beyond question, is the complete exemption from the jurisdiction of the Courts of the country to which the minister is accredited. They are all, so far as I have been able to ascertain, equally clear in the opinion that the exemption extends to the family and suite of the ambassador. "This immunity," says Wheaton, "extends not only to the person of the minister but to his family and suite, secretaries of legation and other secretaries, his servants, moveable effects, and the house in which he resides": International Law, ed. 1863, p. 394. Again, "the wife and family, servants, and suite of the minister participate in the inviolability attached to his public character": Ibid. 397. For these propositions he quotes Grotius, Bynkershoek, Vattel, and Martens, and he treats these privileges as essential to the dignity of his sovereign and to the duties he is bound to perform. Martens says, "The exemption from civil jurisdiction, contentious and voluntary alike, is general, and belongs to ministers throughout the whole extent of the country in which they reside. They enjoy it for themselves, for their suite, and for their effects, in as far, be it always understood, as they do not travel out of their diplomatic character": Guide Diplomatique, vol. i. p. 81. To the same effect is the statement by Calvo: "The staff of the mission, the wife and family of the diplomatic agent, participate in these prerogatives," and amongst the prerogatives there enumerated is that "he is exempt from the local jurisdiction of the country into which he is sent; no legal process can be brought against him before the tribunals of the place of his residence": vol. i. p. 381. "The person who enjoys exterritoriality," says the German Bluntschli, "cannot be subjected to any impost": International Law Codified, art. 138. "The family, the staff, the suite, and the servants of him who has the right of exterritoriality," says the same writer, "enjoy the same immunity as himself. His suite have the right but indirectly and on account of him to whom they are attached": art. 145. "Such persons are exempt from jurisdiction": art. 147. "The immunity of the person exempted extends to the members of his suite": Heffter, International Law of Europe, s. 42, VI. These are amongst the most recent French and German autho-

rities upon the subject, and are for the most part subsequent to those cited in the elaborate arguments in *Taylor* v. *Best* (1) and *Magdalena Steam Navigation Co.* v. *Martin* (2); and, so far as I have been able to ascertain, no writer on international law appears to entertain any doubt upon this point.

It was urged for the defendant that there are English authorities conflicting with these propositions. I do not think it is so, if they are carefully considered. It was said that in *Fisher* v. *Begrez* (3) it was held that the goods of a chorister to the Bavarian embassy were not privileged from execution under a fi. fa.: but in that case the sheriff had not executed the fi. fa.; nor was the protection of the Court claimed by the ambassador or his servant. The sheriff claimed to be exempt from the duty of levying. The defendant had allowed himself to be sued and the action to proceed to judgment and execution without claiming the privilege, and the sheriff applied to the Court upon affidavits which were quite insufficient to shew, and failed to satisfy the Court, that there was any foundation for the allegation that the defendant was then in the service of the Bavarian minister.

In *Novello* v. *Toogood* (4) it was held that the goods of a chorister in the service of the Portuguese ambassador were not privileged from distress for poor-rates. But in that case the servant was carrying on the business of a lodging-house keeper in the house in question. Most writers on international law say that with regard to an ambassador even, although he does not lose his privileges as an ambassador by engaging in trade in the country to which he is accredited, yet the immunity of his goods does not extend to protect his stock-in-trade. The ratio decidendi in *Novello* v. *Toogood* (4) is that the plaintiff Novello, who claimed exemption from poor-rate, was carrying on the business of a lodging-house keeper in the house in question.

An exception from the privilege of being exempt from jurisdiction is, by the statute of 7 Ann. c. 12, s. 5, specifically applied to the case of an ambassador's servant carrying on a trade; and in *Novello* v. *Toogood* (4), Abbott, C.J., so far from hinting a doubt as to the general principle that the immunity from process

(1) 14 C. B. 487.
(2) 2 E. & E. 94.
(3) 1 C. & M. 117.
(4) 1 B. & C. 554.

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extends to the servant of the ambassador, observes, "I do not say that he may not have a house fit and convenient for his situation as the servant of an ambassador, nor that the furniture in such a house will not be privileged." It may be added that Novello was a British-born subject, and that most writers on international law are of opinion that a subject of the country in which the ambassador is resident remains subject to the law of his country, and that in respect of him the immunity which would be afforded to a foreigner cannot be claimed. *Poitier* v. *Croza* (1) was cited, but in that case the Court was convinced that the alleged service was a sham.

Reliance was placed on *Taylor* v. *Best*. (2) But the substance of the decision in that case was that, where the ambassador had voluntarily appeared as one of several defendants, and defended the action up to judgment, he had waived his privilege, and it was too late for him to apply to have all further proceedings stayed or to have his own name struck out of the record. It is true that Maule, J., expressed doubts as to whether an ambassador in England could claim a complete immunity from all English process. But that doubt was removed and pronounced to be ill-founded in the considered and elaborate judgment of the Court of Queen's Bench in *Magdalena Steam Navigation Co.* v. *Martin* (3) in which it was held that the minister of a foreign country cannot be sued against his will in this country, although the action may arise out of commercial transactions carried on by him here. There is, therefore, nothing in the current of English authorities to contravene the doctrine of exemption from process—a part of the privileges which constitute the "exterritoriality" of foreign jurists—as laid down by the writers on international law: and there is nothing in the circumstances of this case to prevent its application to Senhor de Basto. He is not carrying on trade nor letting lodgings; and the house in question is simply the private residence of himself and his family; and I am of opinion that he was not liable to pay the rates assessed upon him in respect of his occupation.

It follows that under s. 190 of the local Act the plaintiff, as

(1) 1 Wm. Bl. 48. (2) 14 C. B. 487, 490.
(3) 2 E. & E. 94.

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the landlord of his house, was liable to pay them; and, having paid them, it is clear that, under the covenant sued upon, the defendant is bound to recoup him. The judgment of the county court judge was right therefore, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Routh, Stacey, & Castle, for Inman, Adam, & Thring.*

Solicitors for defendant: *Priors, Church, & Adams.*

E. L.

HALL, APPELLANT; THE URBAN SANITARY AUTHORITY OF THE BOROUGH OF DERBY, RESPONDENTS.

Nov. 12.

"Public Charity," House used for Purposes of—Railway Servants Orphanage —Exemption from District Rates—6 Geo. 4, c. cxxxii., s. ciii.

By a Local Improvement Act, 6 Geo. 4, c. cxxxii., s. ciii., the commissioners of a town were authorized to make district rates for defraying the expenses of the Act, provided that none of the rates or assessments which should be made by virtue of this Act should be laid upon or in respect of "any houses or buildings used and occupied exclusively for the purposes of public charity":—

Held, that an orphanage founded and used for the purpose of boarding, lodging, clothing, and educating the children of deceased railway servants, and supported partly by subscriptions from railway servants but mainly by donations from the public, was open to such an extensive class of the community of the kingdom that the premises were used and occupied exclusively for the purposes of "public charity," within the proviso of the Act, and therefore exempt from rateability under it.

SPECIAL CASE stated by justices of the peace in and for the borough of Derby under 20 & 21 Vict. c. 43.

On the 21st of September, 1884, Thomas Hall, the secretary to the Railway Servants Orphanage, Derby, hereinafter called the defendant, appeared before the justices to answer the information and complaint of one of the rate collectors of the urban sanitary authority of the borough of Derby.

The defendant was, in respect of premises situate in the borough of Derby, known as and occupied by the Railway Servants Orphanage, rated and assessed by certain general district rates made under the provisions of the Public Health Act, 1875,

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by the urban sanitary authority, and the rates were, subject as hereinafter set forth, due from the defendant, and had been lawfully demanded, but he had failed to pay the same.

The defendant disputed the validity of the rates on the ground that, by the Acts of Parliament in operation in the borough of Derby authorizing the making of the like rates, the premises, known and occupied as the Railway Servants Orphanage, were exempted from taxation, for the reason that they were occupied exclusively for purposes of public charity.

The following enactments were admitted to be those upon which the questions of the validity of the rates so made upon the premises assessed depended, namely:—"The 6 Geo. 4, c. 132, intituled, "An Act for better paving and otherwise improving the borough of Derby," of which s. 103 authorized the commissioners to make rates for defraying the expenses of the Act. Provided always and it is hereby declared that none of the rates or assessments which shall be made "by virtue of this Act shall be laid upon or in respect of any houses or buildings used and occupied exclusively for the purposes of public charity. . . ."

By 22 & 23 Vict. c. 11, intituled, "An Act to confirm certain provisional orders under the Local Government Act, 1858," confirming a provisional order made by the Secretary of State for the Home Department, under the provisions of the Local Government Act, 1858, "so much of s. 103 as exempts from any of the rates or assessments made by virtue of the said Local Act, all lands or grounds used solely for husbandry and agricultural purposes and houses of which the annual value, to be ascertained as in the said Act directed, shall not exceed 5*l.*, shall be repealed, but such repeal shall not extend and apply to houses and buildings occupied exclusively for the purposes of public charity."

And the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 211, sub-s. 1, provides (*c*):—

"If within any urban district or part of such district any kind of property is exempted from rating by any Local Act in respect of all or any of the purposes for which general district rates may be made under this Act, the same kind of property shall in respect of the same purposes and to the same extent within the parts to which the exemption applies (but not further or otherwise)

be exempt from assessments to any general district rates under this Act unless the Local Government Board by provisional order otherwise direct."

By deed, dated the 1st of January, 1878, certain gentlemen declared, in substance, that they stood possessed of certain hereditaments therein described [being the premises now occupied as the Railway Servants Orphanage] upon trust that they and the survivors of them should, upon such hereditaments, with the moneys then or thereafter to be collected, erect and build and from time to time repair, enlarge, or rebuild a house or orphanage to be called the Railway Servants Orphanage, and permit the orphanage and school-house or houses to be used for the suitable maintenance, board, lodging, clothing, education, and instruction of such orphans or destitute children of deceased railway servants as should from time to time be elected, nominated, or presented, or otherwise admitted in accordance with the rules for the time being of the said orphanage, and under and subject to the rules and regulations set forth in the schedule thereunto annexed, being the rules of the said orphanage then in force, or to the rules for the time being of the said orphanage. It appeared from the said rules contained in the said schedule that the objects of the charity were to board, clothe, and educate children of deceased railway servants who have lost their lives in the performance of their duties till they shall have arrived at fourteen years of age, and that the benefits thereof should be open to the children of both sexes of deceased station-masters, clerks, inspectors, ticket-collectors, guards, drivers, stokers, signalmen, engineers, porters, shunters, police, carmen, platelayers, labourers, mechanics, and other bonâ fide railway servants, including workmen employed by contractors in the construction or repair of a railway, who have lost their lives in the performance of their duty, such children being in needy circumstances. It also appeared therefrom that the children of deceased members of the Amalgamated Society of Railway Servants, or of other railway servants, or of workmen employed by contractors in the construction or repair of a railway who should have subscribed or collected not less than two shillings each annually for the orphanage fund, were to be placed first, and in a distinctive manner, on the list of candidates

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for election. It also appeared that in addition to the contributions of railway servants, the charity was to be supported by annual subscriptions and donations from the general public, and that all subscribers were to be represented in its management by a board of governors to be nominated and appointed as therein mentioned, and that the affairs of the institution were to be managed by a committee elected by the governors out of their own body, or otherwise. It also appeared that the selection of candidates for admission to the orphanage was to be determined by the votes of the subscribers as therein described.

On the 31st of May, 1881, by a resolution of the committee of the Railway Servants Orphanage it was amalgamated with and became part of the Railway Benevolent Institution, on conditions [set out in the case]. And it was further resolved that the rules of the Railway Servants Orphanage be rescinded, and that the said orphanage should, from the date on which the Railway Benevolent Institution should ratify the amalgamation, be subject to the general rules of that institution as thereby amended, and also subject to certain special rules. [A copy of the rules of the Railway Benevolent Institution as thereby amended and supplemented, was annexed to and formed part of the special case.]

These rules shewed that part of the scheme of the Railway Benevolent Institution was to carry on the Railway Orphanage upon similar lines to those upon which it was originally founded, that it was intended to be supported by a fixed proportion of the income belonging to the servants' department of the Railway Benevolent Institution (such income being derived from donations, subscriptions of members, honorary subscriptions, legacies, &c.), that its income and management were separate and distinct from that of the Railway Benevolent Institution, being by a committee consisting of six members to be nominated by the board of management of the said Railway Benevolent Institution, and of twelve honorary subscribers to be elected by the subscribers, subject to the approval of the said board of management, and that in the election of children to the benefits of the said orphanage all subscribers were entitled to votes. It was provided by the 73rd, 74th, 76th, 77th, and 94th rules that the design of the orphanage should be to board, clothe, and educate

children of deceased railway servants who had lost their lives in the performance of their duty; that after so providing any remaining vacancies should be open to the reception of the children of railway servants being subscribing members of the Benevolent Institution or to the orphanage who had died a natural death; that in the admission of children preference should be given to those whose fathers had subscribed to the funds; that the names of children eligible for election whose deceased fathers had been members of "the servants department" of the Railway Benevolent Institution, or had subscribed not less than two shillings annually to the orphanage funds should be placed first and in a distinctive manner on the list of candidates, or at the discretion of the orphanage committee such children might be admitted without election; and that the orphanage committee might, without election, receive into the institution orphans eligible according to the rules on payment in advance by any person or persons, committee, railway company, or other public company or corporation, of such sum annually or of such single payment as the committee might from time to time fix, provided that the payment should not entitle the donor or donors to a vote.

The said premises were occupied and used upon and for the trusts and purposes of the said deed and in accordance with the rules hereinbefore mentioned.

The books of the Railway Servants Orphanage were produced at the hearing, and shewed that it almost entirely depended for its support on public contributions. Its income during the year ending the 30th of April, 1884, being as follows:—

	£	s.	d.
Donations	1269	19	0
Ditto for Extension Fund (the result of a special appeal by Sir W. Harcourt at the annual dinner)	2652	3	5
Annual subscriptions from the public, including £46 10s. subscriptions from members	1657	14	7
Collections in places of worship	94	3	11
Fêtes, concerts, &c.	762	2	9
Interest	107	8	2
Proportion from servants department of Benevolent Institution	1330	15	7
	£7874	7	5

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The justices decided that the Railway Servants Orphanage was not entitled to exemption, and ordered the defendant to pay the rates.

The question for the opinion of the Court was, whether, upon the above facts, the premises of the Railway Servants Orphanage were premises used and occupied exclusively for the purposes of public charity within the meaning of the before-mentioned enactment, 6 Geo. 4, c. 132, s. 103.

W. Graham, for the appellant. The orphanage is not a private but a public charity. Of course it is not so open to everybody as a public highway or public-house, but is not the less public because the class for whose benefit it is instituted is limited, as in most cases of undoubted public charities. The hospitals and infirmaries, although cases of accident are generally admitted, do not receive patients without an order. The public support this orphanage. The Act of Parliament did not intend that the money supplied by the public at large should be taken from the objects of the charity and applied to the purposes of the town. There is no direct authority on the question as to what is a "public charity," but in the case of *Attorney-General* v. *Pearce* (1), where a testatrix bequeathed 100*l.* to "each of the public charities" mentioned in a former will of another person, Lord Hardwicke, L.C., said that it is the extensiveness which constitutes a charity a public one. And in *Attorney-General* v. *Heelis* (2), where a common was enclosed under an Act and vested in commissioners upon trust to apply the rents for the improvement of a town, Sir John Leach, V.C., said that it is the source from whence the funds are derived, and not the mere purpose to which they are dedicated, which constitutes the use charitable, and that they were charitable funds to be administered by the Court. This fund is not only subscribed chiefly by the public, but is devoted to a charitable purpose. In *Dolan* v. *Macdermot* (3), where there was a bequest of personalty "for such charities and other public purposes as lawfully might be in the parish of Todmorton," Lord Cairns, L.C., thought it clear that the testator

(1) 2 Atk. 87. (2) 2 S. & S. 67, at p. 77.
(3) Law Rep. 3 Ch. 676.

did not point to private charities, and that there was a good charitable gift.

In 35 & 36 Vict. c. 24, s. 14 (an Act to facilitate the incorporation of trustees of charities), there is a definition of the term "public charitable purposes," viz., all such as come within the meaning, purview, or interpretation of 43 Eliz. c. 4, which is wide in its terms. The cases cited to the justices on behalf of the respondents were those as to poor-rates and prior to the Mersey Docks Case. But the appellant admits that the orphanage is rateable to the poor-rate. The question is, whether it is a public charity, and therefore within the exemption from the district rate.

E. Lumley (*A. Charles, Q.C.*, with him), for the respondents. The premises are not exclusively used and occupied for the purposes of public charity within the meaning of the Act. Those words must be interpreted with regard to the enactment in which they are found, viz., an exemption from rating, and the cases and statutes cited for the appellant do not apply. The 35 & 36 Vict. c. 24, as to the incorporation of trustees, is applicable both to private and public charities, and the jurisdiction of Chancery is over both. The cases on the construction of wills are equally inapplicable. This orphanage is a private charity. The test is not who is the donor, but who is the recipient; whether the charity is *for* the public—not *by* the public. But even if it were *by* the public, this charity is not exclusively a charity maintained by the public. It is also supported by contributions from railway servants. The premises to be "used and occupied for the purposes of public charity" must be for the public without restriction, that is, be open to all members of the public in need of the particular aid provided by the charity. For example, the charities for the relief of the deaf, dumb, or blind, which are open to all members of the public so afflicted. But this orphanage is limited to the children of the servants of particular employers, viz., railway companies. Before *Jones* v. *Mersey Docks* (1), the decisions as to the rateability of charities were in confusion, and Byles, J., the dissentient judge in the House of Lords, summing up the earlier cases, shewed that the distinction was whether the

(1) 11 H. L. C. 443.

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occupation was for the benefit of the public at large, or for the partial benefit of a section of the public. (1) The persons who drew this Act must have had rating in view, and cannot have intended to exempt the orphanage, which was not established until long afterwards. No distinction can be drawn between a charity for those of a certain family and for those in a certain employment, e.g., between a charity for the founders' kin, or for railway servants. As the children of railway servants are brought from all parts of the kingdom to this orphanage, it is hard on the ratepayers of Derby if this charity is exempted from contribution to the district rate. The distinction between a private and public charity is shewn in *Reg.* v. *Inhabitants of Stapleton* (2), where there was a school founded in Bristol for poor boys, a specified number to be sons of freemen of Bristol, the rest might be born elsewhere, but a preference was to be given to those of the founders' kin and name. Blackburn, J., said that the purpose for which the premises were occupied was not public in any sense of the word, and that they were "occupied for the purposes of a highly laudable charity, but one of a strictly private nature," and see *Governors of the Bristol Prison* v. *Wait.* (3)

W. Graham replied.

Cur. adv. vult.

Nov. 12. MANISTY, J. (after stating the facts and the question raised.) We have heard a very able argument on both sides as to the meaning of the words "public charity." That this institution is a charity cannot be disputed, as the purposes are set out in the special case and may be summed up thus, viz., the maintenance, board, lodging, clothing, and education of orphans the children of railway servants who either have been killed on the railway or have died a natural death. So that no doubt it is a charity. Then what ought we to take into consideration in ascertaining whether it is a "public charity"? It seems to me that we ought to consider the general character, or, in other words, the constitution of this orphanage and the purposes for which it is constituted. It is said that we ought also to consider

(1) 11 H. L. C. 443, at pp. 484, 491.
(2) 4 B. & S. 629, at p. 639. (3) 5 Ad. & E. 1.

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the source or sources from which the income is derived. Speaking for myself, I think that the main point to consider is the purpose of the institution. I have much doubt whether the test of a public charity is the *source* from whence the income is derived. It is not necessary however to consider that, for here the income is derived (with a small exception) from voluntary donations of the public. If the source from whence the income is derived is one of the tests, this institution seems to me to be a public charity. But the purposes are to my mind the main question to be considered. On the one hand it is said that whether the charity is "public" depends on whether it is universal, and that if the objects are confined to a particular class the charity is deprived of its public character. I cannot accept that argument. If that were so, what would become of charities unquestionably public, as the many institutions for the deaf, dumb, and blind? It may be difficult to give a definition of "public charity" which would embrace every "public charity," but it is unnecessary to do so. The whole question is whether the premises of this orphanage are "used and occupied exclusively for the purposes of public charity." There may be a public charity the purposes of which are confined to a particular class. Let us see whether this charity is not for a large and extensive section of the community. It is an excellent and beneficial institution for a very large class of her Majesty's subjects. Then is there any authority on the point? The decision in *Attorney General* v. *Pearce* (1) seems exceedingly appropriate to this case. No doubt the question there arose on the construction of a will, but in construing either a will or an Act of Parliament we must regard the intention of it. In *Attorney General* v. *Pearce* (1) a lady had given money to charities of a "public nature" (a most apt expression) and another lady gave money to each of the public charities which the former lady had mentioned in her will. The question arose whether those charities were of a public nature, and Lord Hardwicke, L.C., used language which is extremely useful to assist us in this case. The argument was as to the distinction attempted for the defendant that the testatrix meant by the word "public" in her will to distinguish the

(1) 2 Atk. 87.

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charities from private charities, and the Lord Chancellor said, "I am rather of opinion that the word *publick* was meant only by way of description of the nature of them"—so here, I think the word "public" in this Act meant only a description of the nature of the charities,—"and not by way of distinguishing one charity from another; for it would be almost impossible to say which are publick and which are private in their nature. The charter of the Crown cannot make a charity more or less publick, but only more permanent than it would otherwise be, but it is the extensiveness which will constitute it a publick one." (1)

Surely this charity is extensive. It extends to the whole of the railway servants all over England. If that be the right definition, which I wish entirely to adopt in this case, we clearly ought to hold that this orphanage is occupied exclusively for the purposes of a public charity. I will only mention one other case, viz., that of *Governors of St. Thomas' Hospital* v. *Stratton* (2), where the question was whether St. Thomas' Hospital was exempt from rateability, and Lord Hatherley said that he had read the statement set out in the printed papers, and added, "I cannot find anything there which ought to authorize us to distinguish between this case and that of any other public charity. . . ." The justices decided that the premises were not exempt. I am of opinion that they are.

SMITH, J. I am of the same opinion. The question is not whether the orphanage is or is not rateable to the poor according to the general laws of this kingdom, but is whether the premises come within the provision of the local Act, as "used and occupied exclusively for the purposes of public charity." It appears from the case that the whole or the greater part of this fund comes from the public. Therefore the subscriptions are public subscriptions, i.e. made by the public at large as distinguished from those by private individuals or a corporation for its own purposes. It is stated that the "objects of the charity are to board, clothe, and educate children of deceased railway servants who have lost their lives in the performance of their duties till they shall have arrived at fourteen years of age, and

(1) 2 Atk. 87. (2) Law Rep. 7 H. L. 477, at p. 480.

that the benefits thereof should be open"—to whom?—"to the children of both sexes of deceased station-masters, clerks," &c., and "other bonâ fide railway servants, including workmen employed by contractors in the construction or repair of a railway, who have lost their lives in the performance of their duty, such children being in needy circumstances." It seems to me that the objects of these subscriptions are that they are to provide for the whole of the orphan children of the whole railway staff of the kingdom so far as the means of the institution will go. I then read the words of s. 103, on which this case turns, viz. "houses or buildings used and occupied exclusively for the purpose of public charity." It was certainly not contended in the very able argument which we have heard that this is not a charity, so we may read "house, or buildings occupied for the purpose of charity." But the Act says "public charity." It is clear to me that there can only be two classes, viz. "private" and "public" charities. I ask myself, is this a private charity? Of course it is not. Then, even apart from any decided cases, I should have been prepared to hold that, not being a private, it was a public charity. Mr. Lumley argued strongly that the persons for whom, and not from whom, the subscriptions are obtained must be regarded, and that as these are obtained for a class and not for the whole community this is not a public charity. I do not think that argument is well founded. I read the expression "public charity" in the Act to mean a charity for public purposes as distinguished from private. If so, this is a charity subscribed by the public for public purposes. We are not laying down any general definition of a public charity, which may be hard or impossible to do; but I think this institution comes within the words "public charity" used in the Act, and that the opinion of the justices was wrong.

Judgment for the appellant.

Solicitors for appellant: *Beale, Marigold, & Co.*
Solicitors for respondents: *Satchell & Chapple.*

J. R.

1885
Nov. 30.

MACKAY AND ANOTHER *v.* BANNISTER & SON.

County Court—Remission of Action to—Counter-claim for Unliquidated Damages—19 & 20 Vict. c. 108, s. 26.

An action, although for a sum not exceeding 50*l.*, cannot be remitted under 19 & 20 Vict. c. 108, s. 26, to the county court for trial if there is a counter-claim for unliquidated damages.

APPEAL from chambers.

The plaintiffs brought an action in the High Court claiming a balance, 41*l.* 11*s.* 2*d.*, owing for work done and goods sold and delivered. The defence was never indebted, and that the claim consisted of charges for a pump which was never completely put into working order, and for work in attempting to put it into working order. In a counter-claim the defendants repeated the allegations as to the pump, and further alleged negligence in and about the work done, so that the defendants' mill was stopped for two days, whereby they lost the use of the mill and the wages paid to their workmen during that time; and the defendants counter-claimed 10*l.* damages for breach of contract to supply and fit up the pump; 30*l.* damages for the negligence alleged in the counter-claim. Reply. Issue on the defence and denial of the counter-claim.

A master having made an order that this action be tried before the county court of Yorkshire holden at Leeds pursuant to 19 & 20 Vict. c. 108, s. 26, the plaintiffs appealed to Huddleston, B., at chambers, who referred the appeal to the Divisional Court.

Dickens, for the plaintiffs, moved that the order of the master be reversed or varied. The order remitting this action cannot be sustained. The counter-claim is for unliquidated damages, and is in the nature of a cross action. The defendants do not allege that the work for the price of which the plaintiffs sue was so badly done that nothing is due, but that by the plaintiffs' negligence in doing the work the defendants have suffered damage. Suppose the converse case, that the defendants had sued claiming unliquidated damages above 50*l.* for negligence, and the plaintiffs had counter-claimed for the price of the work,

the action could not have been remitted, as the amount of the claim was too large. Granted that as the claim is "for a sum not exceeding 50*l.*" the action is within the letter of 19 & 20 Vict. c. 108, s. 26, yet as counter-claims were not introduced into procedure until a later date the Act cannot be said to apply to them. If it did, an action with a counter-claim of 10,000*l.* might be remitted for trial in the county court. The only power of dealing with counter-claims over 50*l.* is under the Supreme Court of Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 18, which provides that the jurisdiction of an inferior Court in cases of counter-claim under ss. 89 and 90 of the Judicature Act, 1873, shall not be excluded by reason (inter alia) that the counter-claim is for an amount of money exceeding the jurisdiction of the Court, provided that the plaintiff does not object in writing, and "in any case where the counter-claim involves matter beyond the jurisdiction of the Court, notwithstanding the provisions of this section, the Court may stay execution on the judgment for such time as may be necessary to enable any party to apply to remove the proceedings into the High Court or to enable the defendant to prosecute in a court of competent jurisdiction an action for the purpose of establishing his counter-claim." So that if this action had been originally brought in the county court it could have been removed into the High Court. The plaintiffs purposely brought their action in the Superior Court. There is no power under 19 & 20 Vict. c. 108, s. 26, or the Judicature Act, 1875, to order an action for unliquidated damages to be tried in a county court even where the writ is indorsed with a claim for a specified sum: *Knight* v. *Abbott, Page, & Co.* (1); for, as Field, J., said, at the date of the 19 & 20 Vict. c. 108, s. 26, the word "indorsed" could only mean specially indorsed under the Common Law Procedure Act, 1852, and the Judicature Acts made no difference.

The Court called on,

Macmorran, for the defendants, to shew cause. The case is within the express terms of 19 & 20 Vict. c. 108, s. 26, and the mere fact of a counter-claim cannot lessen their effect. The claim and counter-claim arise out of the same matter. It is only when they arise out of a different matter that the counter-claim is

(1) 10 Q. B. D. 11.

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really in the nature of a cross action: see per Lord Esher, M.R., in *Sykes* v. *Sacerdoti*. (1) The matters here are so connected that they ought to be tried together. The same witnesses will be needed. The defendants should not be put to the unnecessary costs of a separate action. This counter-claim may be treated as a set-off.

POLLOCK, B. The question, which is an important one, is, what is the proper construction of s. 26 of 19 & 20 Vict. c. 108? It is contended for the defendants that all the words of that section, read with regard to the legislation at the time the Act passed, undoubtedly enable a judge of the Superior Court in his discretion to order the case to be tried in the county court, for the words are "where in any action of contract brought in a superior court the claim indorsed on the writ does not exceed 50*l*."—those conditions are fulfilled in this case—"a judge of a superior court, on the application of either party after issue joined, may" (which, of course, means "ought in a proper case") "and on such terms as he shall think fit, order that the cause be tried in any county court." After that, the legislature, by the Judicature Act, gave the defendant a right which he had not before. Prior to the Judicature Act the defendant could set off any sum which he wished to give in evidence in diminution of the sum claimed, e.g., in an action for goods sold, a sum representing inferiority in the value of the goods. But if in the case of the sale of a specific article, e.g., of a steam-engine, for 50*l*., the defence to an action for the price was that through a defect in the engine it exploded and caused 500*l*. damage to the defendant, this could not be made the subject of a counter-claim and tried in the same action. But the Judicature Act provides that counter-claims may be tried in the same action. I need not now discuss whether for certain purposes the counter-claim is or is not to be treated as a separate action; that is foreign to the present question. But it is clear to me that when the legislature gives power to the superior court to entertain counter-claims the enactment cannot be supposed to refer back to s. 26 of 19 & 20 Vict. c. 108, and thereby enlarge the terms of it. It comes to the same thing as if this were a claim

(1) 15 Q. B. D. 423, at p. 425.

under 50*l.* and the counter-claim was for something over which the county court had no jurisdiction, as for example, breach of promise of marriage, or seduction. But Mr. *Macmorran* argued that this was a matter of set-off, and not counter-claim. I have already pointed out the distinction between the two, and here the distinction is one of substance, for the defendants are unwilling to treat this as a set-off of diminution in value, and say they are making substantially a counter-claim. If so, the question is whether the learned judge could make this order. I was much impressed with the argument of Mr. *Dickens* on the Supreme Court of Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 18, which is inconsistent with the view of Mr. *Macmorran*. I have no hesitation in saying that the order in this case cannot be made, and must be set aside. The matter being referred to us by the learned judge, and being of much importance, the costs should be costs in the cause.

MANISTY, J. I am of the same opinion.

Order set aside.

Solicitors for plaintiffs: *Blair & W. B. Girling.*
Solicitors for defendants: *Hamlin & Co.*

J. R.

1885
Dec. 8.

STEWARD *v.* THE NORTH METROPOLITAN TRAMWAYS COMPANY.

Practice—Pleading—Amendment of Defence—Prejudice to Plaintiff.

A tramway company were sued for damages caused by their negligence in allowing their tramway to be in an unsafe and defective condition. By their defence they denied negligence. More than six months after the delivery of the defence the defendants applied for an order to amend it, by adding an allegation that under an agreement the liability to maintain the roadway had previously to the cause of action been transferred to the local authority of the district:—

Held, inasmuch as the six months within which, by statute, notice of action must be given to the local authority had elapsed, and the remedy against them was lost to the plaintiff, his position would be prejudicially affected by the proposed amendment, and it therefore ought not to be allowed.

APPEAL by the defendants against an order of Huddleston, B., at chambers, setting aside an order of a master giving the defendants liberty to amend their statement of defence.

On the 27th of January, 1885, the plaintiff was hurt by reason of the defective state of the defendants' tramway.

On the 11th of April, 1885, he delivered a statement of claim for negligence, alleging that the rails of the tramway were too high above the road whereby he was hurt. On the 29th of April, the defence was delivered, denying negligence, and on the 6th of November, 1885, the defendants applied for and obtained the master's order that they might add as a defence an allegation that by a contract between the Tramways Company and the vestry, who were the local authority of the district, the company had ceased to be responsible for the roadway, and it was handed over to the charge of the local authority.

On appeal this order was set aside by Huddleston, B., at chambers.

R. V. Williams, for the defendants, moved by way of appeal from the decision of the learned judge. Perhaps the defence now sought to be added could not be raised at the trial under a mere denial of liability, for Order XIX., rule 15, requires the defendants to state all such ground of defence as if not raised would be likely to take the opposite party by surprise. Therefore, it is right that the proposed ground of defence should be

added by amendment. The non-liability of the tramways company under the circumstances has been established by *Howitt* v. *Nottingham and District Tramways Company, Limited.* (1)

Biale, for the plaintiff. Six months after delivery of their defence the defendants attempt to shift their ground, and to defeat or prejudice the case against them by shewing liability in others. But any remedy against the vestry is now lost, because six months' notice of action is a condition precedent to an action against the local authority, and the time for giving such notice has expired.

The Court will not readily interfere with the discretion exercised by the learned judge at chambers: *Golding* v. *Wharton Saltworks Company.* (2)

[MANISTY, J., referred to *Tildesley* v. *Harper.* (3)]

The position of the plaintiff has been irretrievably altered by the defendants' pleadings.

Cur. adv. ult.

Dec. 8. POLLOCK, B. The question, which is of importance to the plaintiff, is of still greater importance as involving a matter of practice. The question is this: whether the defendants should be allowed to amend their statement of defence? I had some doubt, but have now arrived at the same conclusion as my learned Brother. The statement of claim alleged that the plaintiff had sustained personal injury from the negligence of the defendants, who were a tramway company, in allowing their tramway and rails to be in an unsafe and defective condition, and, as the plaintiff alleged, above the surface of the road. The defendants pleaded denying the whole of the allegations in the statement of claim, and they also added, by their second paragraph, that, if the accident did occur, it happened through the plaintiff's want of reasonable care. Neither of those defences disclosed in any manner that the defendants were not the proper parties to be sued. It was suggested for them that possibly the traverses of the statement of claim might be sufficient to raise the defence. If so, there would be no need to amend it. But Mr. R. Vaughan Williams' better opinion seemed to be that the defendants could not raise that

(1) 53 L. J. (Q.B.) 21. (2) 1 Q. B. D. 374.
(3) 10 Ch. D. 393.

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defence under those traverses. So it is important to consider whether the defendants can amend. The proposed amendment was this: The defendants proposed to state (after the date of the notice of trial) that the tramway company had entered into an arrangement with the local board of the district, being the vestry, whereby the vestry was to keep the roadway in order, including the space between the tramway rails. The plaintiff did not object to the addition of some other defendants, who might or might not be liable on the same facts which he had alleged against the present defendants. But he said that if he had been told that this was the defence some months ago he could have maintained an action against the local authority, and if they were liable, have recovered from them. But by the usual clause in Acts relating to public bodies, actions against such authority must be brought within six months, which time has elapsed, so that if the defendants now pleaded in the manner proposed, the plaintiff might fail against the present defendants as not being the proper defendants, and yet if he brought an action against the vestry, he would be too late. That no doubt puts the plaintiff into a very difficult position, which he cannot be supposed to have contemplated when he commenced his action. The test as to whether the amendment should be allowed, is whether or not the defendants can amend without placing the plaintiff in such a position that he cannot be recouped, as it were, by any allowance of costs, or otherwise. Here the action would be wholly displaced by the proposed amendment, and I think it ought not to be allowed. No doubt in saying so we take away from the defendants the right to defend themselves by this particular plea. But that is only one of many cases in which the Courts have said that if a defendant chooses to conduct his defence to a certain point on certain lines, and lead the plaintiff on into a certain position, the defendant has no right to change his front. That is only acting on the well-known doctrine of estoppel, and I think, in common fairness and equity, the defendants are estopped from saying they are not the proper defendants. The order of my Brother Huddleston was correct, and the appeal must be dismissed with costs.

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MANISTY, J. I am of the same opinion. It may be sufficient to refer to one or two authorities on this point. . . . .

In *Tildesley* v. *Harper* (1), decided in 1878, the Court of Appeal, if they did not decide the point now before us, did lay down the proper rule to be observed. There the statement of claim alleged that the donee of a power had received a sum as a bribe. The defence contained no general denial of it, and Fry, J., held such denial as there was to be evasive, and refused leave to amend the statement of defence. But the Court of Appeal thought leave ought to be allowed, and Bramwell, L.J. (2) stated what the rule ought to be, saying: "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting malâ fide, or that,"—(and this is the remark that applies here)—"by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise," and the Lord Justice went on to say that in that case he doubted whether the mistake was bonâ fide. Another case is *Claparede & Co.* v. *Commercial Union Association* (3), where the amendment sought was of particulars and not of pleadings. From the statement of defence it appeared that the particulars were rather defective. To an action on a policy of insurance for the loss of two lighters in tow of a tug, the defence was unseaworthiness of the lighters. A commission went to France, where evidence was taken as to the lighters, and questions were also asked as to the tug. The defendants applied to amend these particulars so as to include an inquiry into the seaworthiness of the tug. Field, J., at Chambers, allowed the amendment on conditions which were said to be too onerous, and there was an appeal to the Divisional Court, which thought the plaintiffs would be damnified by the amendment, their principal witness having since gone to Africa, and Huddleston, B., said: "The view taken by Bramwell, L.J., as to allowing such amendments of pleading is correct: *Tildesley* v. *Harper*. (1) We have only to consider whether such would or would not cause serious injury to the plaintiffs—i.e., an injury which could not be remedied. Field, J., only granted leave upon condition that the plaintiffs should not

(1) 10 Ch. D. 393. (2) 10 Ch. D. at p. 396.
(3) 32 W. R. 151.

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STEWARD v. METROPOLITAN TRAMWAYS COMPANY.

be damnified. We find now that the plaintiffs would be damnified . . . ." and the amendment was disallowed. The Court of Appeal reversed that decision (1) on the ground that the plaintiff would *not* be damnified, but adopted the principle that if he would the amendment ought not to be allowed. Brett, M.R., said: "The rule of conduct of the Court in such case is that however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side," and the other Lord Justices concurred. So the Court adopted the principle laid down by Bramwell, L.J., in *Tildesley* v. *Harper*. (2) Here the statement of defence was put in as long ago as the 29th of April, and the order to amend was not applied for until November, and then it was too late for any remedy against the local authority which the plaintiffs might have had if the defence now attempted had been set up in the first instance. Therefore an amendment in this case would clearly work an injury to the plaintiff. Under these circumstances I think the order of Huddleston, B., was correct, and this appeal must be dismissed with costs.

Appeal dismissed, with costs to plaintiff in any event.

Solicitor for plaintiff: *R. A. Biale.*
Solicitor for defendants: *Hugh C. Godfrey.*

(1) 32 W. R. at p. 263. (2) 10 Ch. D. 393.

J. R.

SMITH & CO. *v.* HARGROVE & CO.

1885
Dec. 1.

Practice—Liability—Damages—Detail—Order for trial of one Question before the other—Order XXXVI., r. 8.

Where liability and also the amount of damages are disputed in an action, and the question as to the amount of damages is one of such detail or nature that it probably will be referred to some other tribunal than a jury, it is a proper exercise of discretion under Order XXXVI., r. 8, to order the question of liability to be tried, and the question of damages to be postponed until afterwards.

APPEAL from Chambers.

By their statement of claim the plaintiffs alleged damages from breaches of a charterparty and bills of lading and default in delivering of goods carried thereunder, and also alleged negligence of the defendants in the management of the vessel carrying the goods, whereby they were lost. Particulars of damage containing a detailed statement of the quantity, weight, and value of the goods, and of charges incurred with respect to them, were subjoined. In the defence the breaches of contract were not admitted, and the negligence was denied. The reply joined issue. The defendants subsequently admitted the charterparty, bills of lading, and non-delivery of the goods.

The plaintiffs having obtained an order from a master that the trial of the action be confined to the question of negligence, and that all other questions be postponed until after the trial of such issue of negligence,

On appeal, Huddleston, B., at Chambers affirmed the order of the master.

W. R. Kennedy, Q.C., for the defendants, moved by way of appeal. The order is wrong. The object of the Judicature Act was to try all disputes together, and it was considered a beneficial object. Separate trials of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds: *Piercy* v. *Young* (1), per Jessel, M.R. That case was decided on the former Order XXXVI., r. 6, which is almost identical with the present

(1) 15 Ch. D. 475, at p. 479.

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r. 8 of Order XXXVI., under which the master's order was made. There are no special grounds in this case. A jury of business men can deal with details of damages.

J. Gorell Barnes, who appeared to shew cause for the plaintiffs, was not called on.

POLLOCK, B. This is an order made by my Brother Huddleston, affirming an order made by the Master, under Order XXXVI., r. 8, ordering the question of damages to be tried separately from the question of negligence. I entirely agree with what has been said by Mr. Kennedy, that this Court or any Court ought to act with great caution before they divide piecemeal different issues to be tried in a cause, and it is to such cases that the remarks made by the late Master of the Rolls in *Piercy* v. *Young* (1), and one or two other cases also, are applicable. It is obvious that if there are certain issues, as to who is the proper defendant, as to the conduct of the defendant, and matters of that kind, we should require a very strong case to induce us to say that the expense of six or seven or even two trials where all the issues might be tried in one, should be incurred; but in this case we have one in which we see by the shape of the statement of claim that the plaintiff conceives he has a right of action against the shipowner in whose ship he had shipped his goods, first, under a bill of lading, secondly, under the same bill of lading in another form, and, thirdly, under a general allegation that the defendants made default in delivery of the goods at the port of discharge of the goods. All those are matters which practically, so far as the issue of fact which is to be determined goes, do not give rise to any question at all, because at the trial, the documents and admissions being put in will enable the tribunal to say what is the purport and construction of those documents, and what is the legal liability arising out of them. Then comes the second branch of the plaintiffs' case namely, that whilst the goods were being carried under that bill of lading, the defendants, by their servants, so negligently and unskilfully navigated and managed the vessel that she and the goods were lost. Again, with regard to the facts, the defendants have admitted that the

(1) 15 Ch. D. 475.

goods were delivered to them and never were redelivered to the plaintiffs or their agent or consignee. The question there is a grave question of fact—the negligence of the defendants or their servants, which will have to be proved affirmatively by the plaintiffs, and ancillary to that will arise the question of whether the goods were lost by the perils of the sea. All that will have to be decided by the proper tribunal, a special jury. But in particulars of damage there are set out, as in an invoice, bundles of rails, bundles of steel bracket plates, and so forth, then deduction of discount, and charges payable upon those goods, of course enhancing their value at the port of discharge, and, therefore, charges in respect of which, at any rate to some extent, to what extent I do not now say, the defendants would be liable, if the verdict were against them. Some are considerable, because they include such matters as engineer's commission, consular fees, commission of 5 per cent., which in itself is a sum above 200*l.*, altogether making a claim of over 5000*l.* Any one who has had experience of trials in cases of this kind finds that the parties are desirous of doing what is reasonable for themselves, and do not keep a special jury listening to the details of a matter of this kind, especially when they remember that unless there is some gentleman of the jury specially cognizant of such matters, it is not the best tribunal to deal with them. But the best reason is that they are questions of detail to be dealt with by an average stater or merchant or some person who has had experience of them, who can go into the facts and figures before answering each question and deal with it as it arises, and who can generally, in the course of an hour or a couple of hours, settle the matter without any difficulty. Another reason is this, that before such a tribunal the same strict proof which may be insisted on by the plaintiff or defendant in a court of law is not wanted. Therefore the case is reduced to the question whether the learned judge has properly exercised his discretion in this matter, I do not say it is a matter which this Court would not reconsider and deal with it independently, although it is a mere matter of discretion, because it is a very important question, but I think it is a matter of pure discretion, and, moreover, dealing with the construction of this rule and the facts of this case, I think the

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discretion has been properly exercised; therefore I think this appeal ought to be dismissed.

MANISTY, J. I quite agree that it is a question of some general and, I may say, considerable importance, and I wish, and have often at nisi prius expressed the wish, that the course which has been taken in this case should be taken more frequently, and I think that where there is a question of damages which, in all probability, will be dealt with by a different tribunal, it is a proper course to make an order that the question of liability be dealt with separately. Ten years ago it was held to be so, in *Liverpool, Brazil, and River Plate Steam Navigation Co.* v. *London and St. Katharine Steam Navigation Co.*, a case only reported in the Weekly Notes of 1875, p. 203. Therefore the present case resolves itself into this, did the master and the judge exercise a wise discretion in saying that the question of damages should be postponed to the question of liability? So far from differing from them and interfering with their decision of the question, I think, on reading these particulars, that this was manifestly a case in which the question of damages ought to be postponed to the question of liability. Therefore, this appeal fails.

Appeal dismissed with costs.

Solicitors for plaintiffs: *Waltons, Bubb, & Johnson.*

Solicitors for defendants: *Gregory, Rowcliffe, Rawle, & Johnson.*

J. R.

AMSTELL *v.* LESSER.

1885
Dec. 16.

Practice—Writ of Prohibition—Application to set aside—Judge at Chambers, Jurisdiction of—Judicature Act, 1873, *ss.* 23, 39—*Order LXXII., r.* 2.

A judge sitting at chambers has jurisdiction to set aside a writ of prohibition issued out of the Petty Bag Office.

Salm Kyrburg v. *Posnanski* (13 Q. B. D. 218) followed.

APPEAL from the order of Stephen, J., at chambers, setting aside a writ of prohibition directed to a county court. The writ had been issued out of the Petty Bag Office (1) on an affidavit by the defendant in a county court action stating that the defendant did not reside or carry on business and that the cause of action did not arise wholly or in part within the jurisdiction of the county court.

Blackwell, for the defendant, moved to rescind the judge's order. The judge in chambers had no jurisdiction to set aside the writ of prohibition. It could only be set aside on motion in Court: Daniell's Chancery Practice, 6th ed. p. 1644. The practice was before the Judicature Act that motions to set aside writs of prohibition such as this were made in the Bail Court. It is contended that the Judicature Acts have not altered the practice in this respect.

[WILLS, J. Does not the decision in *Salm Kyrburg* v. *Posnanski* (2) involve the proposition that a judge sitting at chambers now has power to do anything that a single judge sitting in court could do before the Judicature Acts?]

That case related to attachment, and the decision really rests on the construction of Order XLIV., r. 2, which deals with attachment. It was not necessary to the decision to hold that in all cases a judge at chambers has the same jurisdiction as a single judge sitting in court. By the Judicature Act, 1873, s. 23, and Order LXXII., r. 2, where no other provision is made by the Acts or rules the previous practice is to remain in force.

[He cited *Re Richards* (3); Lloyd on Prohibitions, p. 5; *Baker*

(1) See Daniell's Chancery Practice, 6th ed. 1643.

(2) 13 Q. B. D. 218.

(3) Not reported, except in Lloyd on Prohibition, p. 5.

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v. *Oakes* (1); 12 & 13 Vict. c. 109, s. 39; 13 & 14 Vict. c. 61, s. 22; Judicature Act, 1873, s. 39.]

Ashton, for the plaintiff, was not called on to shew cause.

HUDDLESTON, B. I think this appeal must be dismissed. We are informed by the master that there is a practice of issuing writs of prohibition out of the Petty Bag Office on a mere formal affidavit that there is no cause of action within the jurisdiction of the inferior Court. It seems to me a great anomaly that a writ should issue prohibiting a county court without any judicial sanction, but such seems to be the practice. The question that arises is whether a judge at chambers has power to set such a writ of prohibition aside. It is not seriously suggested on the part of the defendant that he has any merits in relation to this question, and, when the matter comes to be investigated, it seems clear that the county court had jurisdiction, but it is contended that the order of the learned judge is bad because he had no jurisdiction sitting at chambers to make it. Now it is not denied that before the Judicature Acts such an order might have been made by a single judge sitting in the Bail Court. That being so, I think that my Brother Stephen had jurisdiction to make this order, for I think it is clear that a judge sitting at chambers now has the same jurisdiction as a single judge sitting in court had before the Act. If there were any doubt on the subject, it seems to me to be removed by the decision in the case of *Salm Kyrburg* v. *Posnanski*. (2) That was a case argued before my Brothers Grove and Day and myself. I confess I should have thought that case a perfectly plain one, but for the fact that my Brother Day differed. The respect due to his opinion on the subject made me hesitate a little at first, but in the result I arrived at a strong opinion with which my Brother Grove agreed and which I still entertain. That case is an authority binding on us, and it is conclusive of the present case, for the ratio decidendi there clearly involves the result that my Brother Stephen had jurisdiction at chambers to set aside this writ, because a single judge would have had authority to do so sitting in the Bail Court before the Judicature Acts.

(1) 2 Q. B. D. 171. (2) 13 Q. B. D. 218.

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WILLS, J. I am of the same opinion. The objection to the learned judge's order belongs to a class of objections which at the present day do not meet with much encouragement. The gist of the contention is, not that any injustice has been done or any wrong conclusion come to, but that a more expensive and troublesome process ought to have been gone through in order to arrive at the same result, that is to say, that the proceeding should have been by motion in Court and not by summons at chambers. It is, of course, possible that such may be the law, but I must say that one would feel desirous of avoiding such a result if it can legitimately be done. Fortunately, on the existing state of the authorities, there seems to be no difficulty about the matter. It seems clear that before the Judicature Acts the jurisdiction to set aside writs of prohibition, such as this, was de facto exercised by a single judge sitting in the Bail Court. Then s. 39 of the Judicature Act of 1873, as it has been interpreted by the Court, provides that any jurisdiction which a single judge sitting in court might exercise before the Act he may now exercise in chambers. It is quite true that the word "respectively" used in that section does at first sight seem to create some difficulty, and, when my attention was first called to the section, not bearing in mind the decision in *Salm Kyrburg* v. *Posnanski* (1), I must say I entertained an impression somewhat favourable to the contention on behalf of the defendant; but, when one comes to look at that case, it seems conclusive on the point so far as we are concerned, being a decision of a Court of co-ordinate jurisdiction. It was there held by my Brother Huddleston that the word "respectively" in s. 39 was to be construed as equivalent to "either." My Brother Grove agreed with him and gave additional reasons derived from the rules for arriving at the same conclusion. He points out in his judgment that the terms of Order XLIV., r. 2, seem necessarily to imply that a judge at chambers has jurisdiction to issue an attachment; and, if so, this jurisdiction can be given him only by s. 39, and, if s. 39 is to be so read in the case of proceedings for an attachment, it must be so read in other cases. That decision appears to me to afford a perfectly satisfactory ground

(1) 13 Q. B. D. 218.

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for arriving at the conclusion which one would primâ facie consider reasonable with regard to this question. For these reasons I agree that the order of the judge at chambers was correct.

Appeal dismissed. (1)

Solicitors for plaintiff: *Brooks & Co.*
Solicitors for defendant: *Curtis & Hilton.*

E. L.

June 13.

[CROWN CASE RESERVED.]

THE QUEEN *v.* ASHWELL.

Criminal Law—Larceny—Taking invito domino—Delivery of Chattel under Mistake as to its Character—Mistake common to both Parties—Subsequent fraudulent Appropriation.

The prisoner asked the prosecutor for the loan of a shilling. The prosecutor gave the prisoner a sovereign believing it to be a shilling, and the prisoner took the coin under the same belief. Some time afterwards he discovered that the coin was a sovereign, and then and there fraudulently appropriated it to his own use. The prisoner was convicted of larceny of the sovereign:—

Held, that the prisoner had not been guilty of larceny as a bailee; but

The Court being equally divided as to whether the prisoner had been guilty of larceny at common law, the conviction stood.

CASE stated by Denman, J.

At the assizes for the county of Leicester in January, 1883,

(1) The practice of issuing writs of prohibition out of the Petty Bag Office without the leave of a judge upon an affidavit stating that there is no cause of action within the jurisdiction of the inferior Court appears to be very ancient, having existed for at least 300 years. See Bacon's Abridgment, Prohibition A. and authorities there cited. It seems probable that it may have originated in the fact that there were long intervals during which the courts of common law were formerly closed to the suitor, but at the present day the necessity for the practice not existing to the same extent it is but seldom resorted to. See on this subject *Blackborough* v. *Davis* (1 P. Wms. 41); *Anonymous Case* (1 P. Wms. 476); *Crowley's Case* (2 Sw. 1). The jurisdiction of a superior Court of common law to set aside the writ of prohibition issued out of Chancery was put beyond a doubt by 12 & 13 Vict. c. 109, s. 39, see *In re Baddeley* (4 Ex. 508), but it appears possible that it existed independently of the statute, because the Chancery writ, which issued alike in term time or vacation, is said to have been returnable in B. R. or C. P.: *Blackborough* v. *Davis* (1 P. Wms. 41). See also 4 Inst. 81.

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Thomas Ashwell was tried for larceny of a sovereign, the moneys of Edward Keogh.

Keogh and Ashwell met in a public-house on the evening of the 9th of January. At about 8 P. M., Ashwell asked Keogh to go into the yard, and when there requested Keogh to lend him a shilling, saying that he had money to draw on the morrow, and that he would then repay him. Keogh consented, and putting his hand in his pocket pulled out what he believed to be a shilling, but what was in fact a sovereign, and handed it to Ashwell, and went home leaving Ashwell in the yard. About 9 the same evening, Ashwell obtained change for the sovereign at another public-house.

At 5·20 the next morning, Keogh went to Ashwell's house and told him that he had discovered the mistake, whereupon Ashwell falsely denied having received the sovereign, and on the same evening he gave false and contradictory accounts as to where he had become possessed of the sovereign he had changed at the second public-house on the night before. But he afterwards said "I had the sovereign, and spent half of it, and I shan't give it him back because I only asked him to lend me a shilling."

It was submitted for the prisoner that there was no evidence of larceny—no taking—no obtaining by trick or false pretence—no evidence that the prisoner at the time he received the sovereign knew it was not a shilling.

I declined to withdraw the case from the jury, thinking it desirable that the point raised should be decided by the Court of Criminal Appeal.

The jury found that the prisoner did not know that it was a sovereign at the time he received it, but said they were unanimously of opinion that the prosecutor parted with it under the mistaken belief that it was a shilling, and that the prisoner having, soon after he received it, discovered that it was a sovereign could have easily restored it to the prosecutor, but fraudulently appropriated it to his own use, and denied the receipt of it, knowing that the prosecutor had not intended to part with the possession of a sovereign but only of a shilling. They added that if it were competent to them consistently with these findings and with the evidence to find the prisoner guilty, they meant to do so.

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A verdict of guilty was entered, but the prisoner was admitted to bail, to come up for judgment at the next assizes if this Court should think that upon the above facts and findings he could properly be found guilty of larceny.

1885. June 13. *Sills*, for the prisoner. A necessary ingredient of the crime of larceny is a taking such that trespass will lie: 1 Hawkin's Pleas of the Crown, ch. 33, s. 1: "It is to be observed that all felony includes trespass; and that every indictment of larceny must have the words felonicè cepit as well as asportavit; from which it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away;" and 3 Inst. xlvii. p. 107; 1 Hale's Pleas of the Crown, 504; Stephen's Digest of the Criminal Law, art. 299. In this case there was no taking invito domino but only delivery of the coin. Admitting that if the prisoner had known at the time it was handed to him that the coin was a sovereign there would be a larceny, for in such case trespass would lie, that is not the present case, for some time elapsed before he discovered what the coin was. The remedy for the subsequent dealing with the coin was not by proceedings as for a trespass, but by action either for conversion or else for money had and received. In *Rex* v. *Mucklow* (1), the prisoner had no animus furandi when he first received the draft, therefore there was no trespass and therefore no larceny, and so the conviction was quashed. *Reg.* v. *Davies* (2) is to the same effect and Erle J.'s view, that the law of larceny laid down in respect of articles found was applicable, was overruled. In *Cartwright* v. *Green* (3) the ground of the judgment was that trespass would lie for breaking open the bureau and feloniously taking the contents. In *Merry* v. *Green* (4) the prisoner at the time he found the purse resolved to take it, and the felonious taking was referable to that time and not to the time of the delivery of the bureau, which was not a delivery of its unknown contents. Even in the case of finding there must be, simultaneously with the finding, a determination to take the object, although the finder has reasonable knowledge of or power of

(1) 1 Moo. C. C. 160.
(2) Dears. C. C. 640.
(3) 8 Ves. 405.
(4) 7 M. & W. 623.

discovery of the owner: *Reg.* v. *Thurborn* (1); *Reg.* v. *Moore.* (2) But apart from these considerations, the objection to treating this as a case of finding is that there was no loss of the chattels. Another necessary ingredient of the crime of larceny at common law, is that there must be a taking invito domino. If the prisoner induces the delivery by trick or otherwise, then there is such a taking, but it is otherwise if the mistake as to what is delivered is common to both: *Reg.* v. *Prince* (3); *Reg.* v. *Middleton.* (4) The case of giving a cabman a sovereign by mistake for a shilling, which was much argued there, is exactly the present case.

As to the suggestion that there was larceny by the prisoner as bailee, it is disposed of by the fact that there was no entrusting of this coin to the prisoner, and no obligation on him to return it: *Reg.* v. *Hassall.* (5) In point of fact there was no obligation to return more than 19*s.*, and the remarks of Cleasby, B., in giving judgment in *Reg.* v. *Middleton* (6) apply.

A. K. Loyd, for the prosecution. Where property comes into the hands of a transferee by mistake as to the subject-matter transferred, there is no delivery which will prevent a subsequent appropriation of it from being a felonious taking; and a trespass is committed when, on the discovery of the mistake, the holder of the chattel wrongfully appropriates it to himself. The delivery which can be set up as an answer to a charge of larceny must be a delivery with intention to pass the property. Delivery induced by fraud, by threats, or by accident, could not be so set up. If a cabman has been given a sovereign for a shilling, and finds out the mistake, not at the time when it is handed to him but afterwards, yet still at a time when he could correct the mistake, he would be guilty of larceny if he then appropriated the sovereign, and there is nothing in the case of *Reg.* v. *Middleton* (4) to controvert this proposition. The trespass was held to take place in the cases of *Cartwright* v. *Green* (7) and *Merry* v. *Green* (8), not when the bureaus were handed over, but when the presence of the money was discovered. The same principle applies when a mistake

(1) 1 Den. C. C. 387.
(2) L. & C. 1.
(3) Law Rep. 1 C. C. 150.
(4) Law Rep. 2 C. C. 38.
(5) L. & C. 58.
(6) Law Rep. 2 C. C. at p. 72.
(7) 8 Ves. 405.
(8) 7 M. & W. 623.

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has been made as to the character of the chattel transferred. If a person receives a chattel thinking it is for him, and appropriates it honestly in that belief, the law does not make him criminally responsible for not disappropriating the chattel when he finds it was not intended for him. This explains many cases of acquittal, but it is not the case here, for the coin was never honestly appropriated. In *Reg.* v. *Mucklow* (1) the mistake was as to the person to whom delivery was made, but, except for that, the elements that go to make delivery of a particular chattel were present. *Reg.* v. *Davies* (2) was decided simply on the authority of the former case. These cases are inconsistent with *Rex* v. *Longstreeth* (3), which was a case of delivery by a carrier to the wrong person. It is submitted that the view taken by Erle, J., was correct, and that *Reg.* v. *Mucklow* (1) was wrongly decided.

If the principles applicable to the finding of a chattel are to be applied to this case, they ought to be applied to the transaction not at the moment of the passing the coin, but at the time of discovering what it was, and the question is, what was the prisoner's state of mind with regard to the coin at that time. The finding of the jury is conclusive that he then and there fraudulently appropriated it.

If a delivery under a mistake as to the subject-matter is of any validity, it can only be treated as delivery for a limited purpose. When the coin delivered turned out to be something else than a shilling, the identical coin should have been returned. In *Reg.* v. *Hoare* (4), *Reg.* v. *Garrett* (5), and *Reg.* v. *Hassall* (6), it was held that it was necessary, in order to convict of larceny as a bailee, that the obligation should be to return the same goods; but that has been departed from: *Reg.* v. *Richmond* (7); and a fraudulent dealing with ear-marked chattels is now held to be within the statutes relating to larceny by a bailee: *Reg.* v. *Aden* (8); *Reg.* v. *Oxenham* (9); *Reg.* v. *Tonkinson* (10); *Reg.* v. *McDonald.* (11)

(1) 1 Moo. C. C. 160.
(2) Dears. C. C. 640.
(3) 1 Moo. C. C. 137.
(4) 1 F. & F. 647.
(5) 2 F. & F. 14.
(6) L. & C. 58.
(7) 12 Cox, C. C. 495.
(8) 12 Cox, C. C. 512.
(9) 46 L. J. (M.C.) 125.
(10) 14 Cox, C. C. 603.
(11) 15 Q. B. D. 323.

It is submitted, therefore, that the delivery of a chattel which is made either under a mistake as to the subject-matter, or in ignorance of its existence, is like a delivery by accident, and is not such a delivery as is inconsistent with a subsequent taking amounting to larceny; and further, that the delivery was for a limited purpose, which made the prisoner a bailee. In either view the conviction was right.

Sills, in reply. There was here an intention to deliver the particular coin which the prosecutor held in his hand, although he did not before handing it over ascertain its value. A mere mistake as to value does not make any difference in the delivery. There can have been no finding here, because there was no loss, and there was no bailment because there was no mandate.

Cur. adv. vult.

Dec. 5. SMITH, J. read the following judgment. The prisoner in this case was indicted for the larceny of a sovereign, the moneys of Edward Keogh.

The material facts are as follows:—Keogh handed to the prisoner the sovereign in question, believing it was a shilling and not a sovereign, upon the terms that the prisoner should hand back a shilling to him when he (the prisoner) was paid his wages. At the time the sovereign was so handed to the prisoner he honestly believed it to be a shilling. Some time afterwards the prisoner discovered that the coin he had received was a sovereign and not a shilling, and he then and there fraudulently appropriated it to his own use. Is this larceny at common law or by statute?

To constitute the crime of larceny at common law, in my judgment there must be a taking and carrying away of a chattel against the will of the owner, and at the time of such taking there must exist a felonious intent in the mind of the taker. If one or both of the above elements be absent there cannot be larceny at common law. The taking must be under such circumstances as would sustain an action of trespass. If there be a bailment or delivery of the chattel by the owner, inasmuch as, among other reasons, trespass will not lie, it is not larceny at common law. In Hawkins' Pleas of the Crown, book i. chap. 33, sect. 1, it is stated:—"It is to be observed that all felony includes tres-

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pass; and that every indictment of larceny must have the words felonicè cepit as well as asportavit; from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away." As I understand, the counsel for the Crown did not really dispute the above definition, and indeed if he had, upon further referring to the 3rd Institutes, chap. 47, p. 107, and 1 Hale's Pleas of the Crown, p. 61, it would be found to be fully borne out by those writers. The two cases cited in argument, *Rex* v. *Mucklow* (1) and *Reg.* v. *Davies* (2), are good illustrations of what I have enunciated; and if other cases were wanted, there are plenty in the books to the same effect.

In the present case it seems to me, in the first place, that the coin was not taken against the will of the owner, and if this be so, in my judgment it is sufficient to shew that there was no larceny at common law; and secondly, it being conceded that there was no felonious intent in the prisoner when he received the coin, this in my judgment is also fatal to the act being larceny at common law.

As to this last point, the law laid down by Cockburn, C.J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., in the case of *Reg.* v. *Middleton* (3), is very pertinent; it is as follows:—"We admit that the case is undistinguishable from the one supposed in argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not, would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the animus furandi." I believe the above to be good law. The contention, however, of the Crown was, that although the above might be correct, yet the present case was to be likened to those cases in which finders of a lost chattel have been held guilty of larceny. The principle upon which a finder of a lost chattel has been held guilty of larceny is, that he has

(1) 1 Moo. C. C. 160. (2) Dears. C. C. 640.
(3) Law Rep. 2 C. C. at p. 45.

taken and carried away a chattel, not believing that it had been abandoned, and at the time of such taking has had the felonious intent. The proper direction to be given to a jury being, as I understand, "Did the prisoner at the time of finding the chattel intend to appropriate it to his own use, then believing that the true owner could be found, and that the chattel had not been abandoned." See *Reg.* v. *Thurborn* (1) and *Reg.* v. *Glyde* (2). If he did, he would be guilty of larceny, aliter he would not. Then it was argued by the counsel for the Crown, that the prisoner in this case was on the same footing as a finder of a chattel. In my judgment the facts do not support him.

Keogh, in the present case, intended to deliver the coin to the prisoner, and the prisoner to receive it. The chattel, namely the coin, was delivered over to the prisoner by its owner, and the prisoner received it honestly. He always knew he had the coin in his possession after it had been delivered to him. The only thing which was subsequently found was that the coin delivered was worth 240*d.* instead of 12*d.*, as had been supposed. This argument, as it seems to me, confounds the finding out of a mistake with the finding of a chattel. In some cases, as above pointed out, the finder of a chattel may be guilty of larceny at common law; but how does that shew that the finder out of a mistake may also be guilty of such a crime? A mistake is not a chattel. The chattel (namely the coin) in this case never was lost; then how could it be found? In my judgment the argument upon this point for the Crown is wholly fallacious and fails. It was further urged for the Crown that the present case was covered by authority, and the cases of *Cartwright* v. *Green* (3) and *Merry* v. *Green* (4) were cited in this behalf. I fail to see that either case is an authority for the point insisted upon by the Crown. In the first of these cases, the question arose upon demurrer to a bill in Chancery as to whether a felony was disclosed upon the face of the bill. Lord Eldon, as he states in his judgment, decided the case upon the ground that, inasmuch as the bureau in question had been delivered to the defendant for no other purpose than repair, and he had broken open a part of

(1) 1 Den. C. C. 387.
(2) Law Rep. 1 C. C. 139.
(3) 8 Ves. 405.
(4) 7 M. & W. 623.

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it which it was not necessary to touch for the purpose of repair with the intention of taking and appropriating to his own use whatever he should find therein, that this was larceny. I conceive this to be distinctly within the principle I have above stated—there was the taking against the will of the owner with the felonious intent at the time of taking.

The other case, namely, *Merry* v. *Green* (1), which was also the case of a purse in a secret drawer of a bureau which had been purchased at a sale, was clearly decided by Baron Parke, who delivered the judgment of the Court, upon the principles applicable to a case of finding. The learned Baron says:—"It seems to us, that though there was a delivery of the secretary, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence: and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a case of simple finding, and the law applicable to all cases of finding applies to this." I understand the learned Baron when he says "the law applicable to all cases of finding applies," to mean the law applicable to the cases of finding a chattel, for there are no cases extant as to finding out a mistake to which his remark could apply. That too is the distinction between the present case and that before Baron Parke. No intention to deliver the chattel (namely, the purse and money) *at all* ever existed, whereas in the present case there was every intention to deliver the chattel (namely, the coin), and it was delivered and honestly received.

In my judgment, a man who honestly receives a chattel by delivery thereof to him by its true owner, cannot be found guilty of larceny at common law, and in my opinion the prisoner in this case is not guilty of that offence.

The second point has now to be considered, namely, was he guilty of larceny as a bailee within the true intent of s. 3 of 24 & 25 Vict. c. 96? To constitute a person bailee of a chattel there must be a bailment and not a mere delivery of the chattel. There must be a delivery of a chattel upon contract, express or

(1) 7 M. & W. 623.

implied, to return it or obey the mandate with which the delivery is clogged, or, in other words, a delivery upon condition.

The question, as it seems to me, is this, is the law in the present case to imply a condition when we know perfectly well that at the time of the delivery of the coin *no condition at all* was in the contemplation of the parties, excepting that a coin of like value should be returned to Keogh when the prisoner had drawn his wages. No condition to return the coin delivered to the prisoner was ever thought of, and in my judgment such a condition cannot be implied. Should, however, any condition be implied as to what was to be done if or when any mistake not then contemplated should be discovered, my opinion is that the only condition, if any, which could be implied would be that the prisoner would not spend or use for his own purposes 19*s.* out of the 20*s.*, and I am of opinion that if the prisoner had, upon the finding out the mistake, taken to Keogh 19*s.* he would have been strictly within his rights.

The case of *Reg.* v. *Hassall* (1) is an express authority to the effect that a person is not a bailee within the statute unless he is under obligation to return the identical chattel deposited with him. In my judgment, the prisoner was not a bailee of the sovereign for the reasons above given.

I am fully alive to the remark which has been made that if the present case is not one of larceny, it should be. Whether this remark is well founded or not I do not pause to inquire, but it seems to me that the observations of Bramwell, B., in *Reg.* v. *Middleton* (2) on this head, are well worthy of consideration. Believing, however, as I do, that according to the law of England, as administered from the earliest times, the present case is not a case of larceny at common law, I cannot hold otherwise than I do, and as, for the reasons given above, the prisoner is not, in my opinion, guilty of larceny as a bailee, my judgment is that the conviction should be quashed.

CAVE, J. (3) The question we have to decide is whether, under the circumstances stated in the case, the prisoner was

(1) L. & C. 58. (2) Law Rep. 2 C. C. 38.

(3) Read by Lord Coleridge, C.J.

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rightly convicted of larceny, either at common law or as a bailee.

It is, undoubtedly, a correct proposition, that there can be no larceny at common law unless there is also a trespass, and that there can be no trespass where the prisoner has obtained lawful possession of the goods alleged to be stolen; or, in other words, the thief must take the goods into his possession with the intention of depriving the owner of them. If he has got the goods lawfully into his possession before the intention of depriving the owner of them is formed, there is no larceny. Applying that principle to this case, if the prisoner acquired lawful possession of the sovereign when the coin was actually handed to him by the prosecutor, there is no larceny, for at that time the prisoner did not steal the coin; but, if he only acquired possession when he discovered the coin to be a sovereign, then he is guilty of larceny, for at that time he knew that he had not the consent of the owner to his taking possession of the sovereign as his own, and the taking under those circumstances was a trespass.

It is contended that, as the prosecutor gave and the prisoner received the coin under the impression that it was a shilling and not a sovereign, the prosecutor never consented to part with the possession of the sovereign, and consequently there was a taking by the prisoner without his consent; but to my mind it is impossible to come to the conclusion that, at the time when the sovereign was handed to him, the prisoner, who was then under a bonâ fide mistake as to the coin, can be held to have been guilty of a trespass in taking that which the prosecutor gave him. It seems to me that it would be equally logical to say that the prisoner would have been guilty of a trespass if the prosecutor, intending to slip a shilling into the prisoner's pocket without his knowledge, had by mistake slipped a sovereign in instead of a shilling. The only point which can be made in favour of the prosecution, so far as I can see, is that the prisoner did not actually take possession until he knew what the coin was of which he was taking possession, in which case, as he then determined to deprive the prosecutor of his property, there was a taking possession simultaneously with the formation of that intention. Had the coin been a shilling, it is obvious that the

prisoner would have gained the property in and the possession of the coin when it was handed to him by the prosecutor; as there was a mistake as to the identity of the coin no property passed, and the question is whether the possession passed when the coin was handed to the prisoner, or when the prisoner first knew that he had got a sovereign and not a shilling.

There are four cases which it is important to consider. The first is *Cartwright* v. *Green* (1), which, however, differs slightly from the present, because in that case there was no intention to give the defendant Green either the property in or the possession of the guineas, but only the possession of the bureau, the bailor being unaware of the existence of the guineas. If the bailee in that case had, before discovering the guineas in the secret drawer, negligently lost the bureau with its contents, it is difficult to see how he could have been made responsible for the loss of the guineas. In *Merry* v. *Green* (2) the facts were similar to *Cartwright* v. *Green* (1), except that the bureau had been sold to the defendant. In that case Baron Parke says, that though there was a delivery of the bureau to the defendant, there was no delivery so as to give a lawful possession of the purse and money in the secret drawer.

If these cases are rightly decided, as I believe them to be, they establish the principle that a man has not possession of that of the existence of which he is unaware. A man cannot without his consent be made to incur the responsibilities towards the real owner which arise even from the simple possession of a chattel without further title, and if a chattel has, without his knowledge, been placed in his custody, his rights and liabilities as a possessor of that chattel do not arise until he is aware of the existence of the chattel, and has assented to the possession of it.

A case much urged upon us on behalf of the prisoner was *Rex* v. *Mucklow* (3). In that case a letter containing a draft for 10*l.* 11*s.* 6*d.* had been delivered to the prisoner, although really meant for another person of the same name, and the prisoner appropriated the draft, and was tried and convicted of larceny. The conviction, however, was held wrong on the ground that he

(1) 8 Ves. 405. (2) 7 M. & W. 623.
(3) 1 Moo. C. C. 160.

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had no animus furandi when he first received the letter. Here as in the two previous cases, the prisoner was not at first aware of the existence of the draft, and when he became aware of it he must have known that it was not meant for him, yet the judges seem to have held that he got possession of the draft at the time when the letter was handed to him.

In *Reg.* v. *Davies* (1) the facts were similar to those in the last-mentioned case, and Chief Justice Erle, then Mr. Justice Erle, who tried the case, directed the jury that if, at the time the prisoner received the order, he knew it was not his property but the property of another person of known name and address, and nevertheless determined to appropriate it wrongfully to his own use, he was guilty of larceny, and that in his opinion the prisoner had not received it, until he had discovered by opening and reading the letter whether it belonged to him or not. "I considered," says the judge, "that the law of larceny laid down in respect of articles found, was applicable to the article here in question." The Court, however, quashed the conviction on the authority of *Rex* v. *Mucklow* (2).

In *Reg.* v. *Middleton* (3), in which it was held by eleven judges against four that, where there was a delivery of money under a mistake to the prisoner, who received it animo furandi, he was guilty of larceny, there occurs a passage in the judgment of some of the judges who formed the majority which is as follows:— "We admit that the case is undistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not, would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the animus furandi."

For my part I am quite unable to reconcile the cases of *Rex* v. *Mucklow* (2) and *Reg* v. *Davies* (1) and the passage I have cited from *Reg.* v. *Middleton* (3) with those of *Cartwright* v. *Green* (4),

(1) Dears. C C. 640.
(2) 1 Moo. C. C. 160.
(3) Law Rep. 2 C. C. 38.
(4) 8 Ves. 405.

and *Merry* v. *Green* (1); and, being compelled to choose between them, I am of opinion that the law is correctly laid down in *Merry* v. *Green* (1) for the following reasons. The acceptance by the receiver of a pure benefit unmixed with responsibility may fairly be, and is in fact presumed in law until the contrary is shewn; but the acceptance of something which is of doubtful benefit should not be and is not presumed. Possession unaccompanied by ownership is of doubtful benefit; for although certain rights are attached to the possession of a chattel, they are accompanied also by liabilities towards the absolute owner which may make the possession more of a burden than a benefit. In my judgment a man cannot be presumed to assent to the possession of a chattel; actual consent must be shewn. Now a man does not consent to that of which he is wholly ignorant; and I think, therefore, it was rightly decided that the defendant in *Merry* v. *Green* (1) was not in possession of the purse and money until he knew of their existence. Moreover, in order that there may be a consent, a man must be under no mistake as to that to which he consents; and, I think, therefore, that Ashwell did not consent to the possession of the sovereign until he knew that it was a sovereign. Suppose that, while still ignorant that the coin was a sovereign, he had given it away to a third person who had misappropriated it, could he have been made responsible to the prosecutor for the return of 20*s*. In my judgment he could not. If he had parted with it innocently, while still under the impression that it was only a shilling, I think he could have been made responsible for the return of a shilling and a shilling only, since he had consented to assume the responsibility of a possessor in respect of a shilling only. It may be said that a carrier is responsible for the safe custody of the contents of a box delivered to him to be carried, although he may be ignorant of the nature of its contents; but in that case the carrier consents to be responsible for the safe custody of the box and its contents whatever they may happen to be; and, moreover, a carrier is not responsible for the loss of valuable articles, if he has given notice that he will not be responsible for such articles unless certain conditions are complied

(1) 7 M. & W. 623.

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with, and is led by the consignor to believe that the parcel given to him to carry does not contain articles of the character specified in the notice: *Batson* v. *Donovan.* (1) In this case Ashwell did not hold himself out as being willing to assume the responsibilities of a possessor of the coin whatever its value might be; nor can I infer that at the time of the delivery he agreed to be responsible for the safe custody and return of the sovereign. As, therefore, he did not at the time of delivery subject himself to the liabilities of the borrower of a sovereign, so also I think that he is not entitled to the privileges attending the lawful possession of a borrowed sovereign. When he discovered that the coin was a sovereign, he was, I think, bound to elect, as a finder would be, whether he would assume the responsibilities of a possessor; but, at the moment when he was in a position to elect, he also determined fraudulently to convert the sovereign to his own use; and I am therefore of opinion that he falls within the principle of *Reg.* v. *Middleton* (2), and was guilty of larceny at common law.

For these reasons I am of opinion that the conviction was right.

MATHEW, J. I concur in the judgment delivered by Mr. Justice Smith, and I desire to add the following observations in support of the conclusion at which we have arrived.

The definitions of larceny at common law which have hitherto been accepted, and which I understand are not now disputed, shew that it is of the essence of the offence that there should be a felonious taking of the property of another without the consent of the owner, and that it must be an actual taking and not a conversion following upon a bailment or delivery by the owner. The taking must be a trespass. In this case, if the defendant had undertaken to get a sovereign changed for the prosecutor and to bring him back 19*s.* he would not, if he failed to keep his word, have been guilty of larceny at common law. This, I presume, cannot be disputed. His misconduct would have been a private injury and not a public wrong punishable as a crime. I am wholly unable to see any difference in the moral delinquency of

(1) 4 B. & A. 21. (2) Law Rep. 2 C. C. 45.

the recipient in that case and in this; in the one case the sovereign is received upon an express promise to account for the change; in the other case it is received upon a promise to the same effect which the civil law of England implies. In neither case would possession of the coin have been obtained by a trespass. In both cases the misappropriation would follow upon a delivery by the owner of that which is said to have been feloniously taken.

But it is said, as I understand, that although the possession of the coin may, in the first instance, have been innocent, the taking occurred when it was changed, and that the felonious intention to take may be inferred from the dishonest conduct of the defendant in spending afterwards the 19*s.* which he ought to have returned to the prosecutor. This means that though the defendant did not take in point of fact, he ought by a fiction to be treated as having done so in point of law, in order that he may be punished as a thief. I do not think this reasoning satisfactory. But suppose there may be a taking in some legal sense, which common sense repudiates, is there any evidence of a felonious taking? Now suppose the sovereign had been handed in mistake to the defendant, not by way of loan or gift but in payment of a debt of 1*s.*, and the defendant had changed the sovereign, taken a shilling and offered the remaining change to the prosecutor, could he have been convicted for larceny of the sovereign? The answer, I presume, would be no; because his conduct would have shewn that he had no felonious intention when he changed the coin. But supposing that, yielding to temptation, he had misappropriated one other shilling and was prepared to hand back 18*s.*, would there then have been evidence against him that he had changed the sovereign with a felonious intent? If not, at what point of misappropriation would the evidence of a felonious purpose in the original changing of the coin commence?

In my judgment, the subsequent dishonesty of the defendant is no more evidence of a felonious intent when the coin was changed in this case than it would be where the coin was received upon an express promise, which was afterwards broken, to account for the change. I think, if this conviction be affirmed, any dishonest dealing with the property of another, by whatever means

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possession of the property may have been acquired, may be made the ground for a prosecution for larceny.

Dishonest conduct like the defendant's ought perhaps to be punished; but, if it must, it should be under a statute passed for that purpose by the legislature, and not by the extension or development of the criminal law by means of judicial decision.

The highly technical reasoning upon which this conviction has been sought to be upheld should have no place, in my judgment, in the interpretation of the criminal law. Upon such a subject as theft, where the law is administered by magistrates as well as judges, it seems to me desirable that the rules by which guilt and innocence are to be determined should be susceptible of ready comprehension and easy exposition.

I think the conviction should be quashed.

STEPHEN, J. Before reading this judgment, I may observe that my Brothers Day and Wills desire me to say that they agree with it.

The facts of this case are as follows:—Keogh, intending to lend Ashwell a shilling, gave him a coin which he supposed to be a shilling, but which in fact was a sovereign. At the time when he received it Ashwell supposed it to be a shilling, but after about an hour he discovered that it was a sovereign, and fraudulently applied it to his own use. The question whether this was larceny was argued, first before five judges, who differed in opinion, and afterwards before fourteen.

The arguments used to shew that it was not larceny were as follows:—From the earliest times it has always been held that a felonious taking is essential to larceny, and that a fraudulent conversion of property after an innocent taking, though in some particular cases criminal by statute, does not amount to larceny at common law. It was further argued that there was in this case no such bailment of the sovereign as would make the prisoner guilty of larceny as a bailee under the 3rd section of the Larceny Act of 1861. I think that these arguments are well founded and ought to prevail; but as a difference of opinion exists on the subject I will give my reasons fully, noticing as I give them what I understand to be the arguments put forward in

support of the opposite view. The history of the law relating to theft from the earliest times to the present day shews that, from the very first notices of the law of theft, it was always considered that the crime involved a taking against the will of the owner. Glanville say (bk. X., c. 13) that a person who does not return what is lent (commodatum) to him, "a furto omnimodo excusatur, per hoc quod initium habuerit suæ detentionis per dominum illius rei." Bracton defines theft as "contrectatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit." This in itself is ambiguous, as the word "contrectatio" might refer, as it certainly did in Roman law (Digest, xlvii. tit. 2, 48. § 4., xlvii. tit. 2. 52. § 19. and xlvii. tit. 2. 54. § 1.) to a fraudulent dealing with the thing after a delivery by the owner, but other ancient authorities make it probable that this was not Bracton's meaning. It will be sufficient for this purpose to quote two cases from the Year Books, each of which lays down the same doctrine at a considerable interval of time. The first is in 2 Edw. 3, p. 1, No. 3. A man was indicted in the sheriffs tourn because he "felonice abduxit unum equum rubrum." The indictment was removed to the King's Bench, and it was said that it was insufficient, because it did not say that the person indicted had taken the horse feloniously (pur ceo que il ne dit pas que vous le emblastes felonice). This was in 1328. In 1474 (13 Edw. 4, p. 9, No. 5) was decided the famous case of the carrier, who, having received goods to be carried to Southampton, carried them elsewhere, opened the bales and stole the contents. This case has been generally understood to decide that a bailee who steals the whole of the goods bailed to him, commits no offence at common law; but that if he breaks bulk and steals part of them he is guilty of theft. Although this view has been generally entertained and is embodied in 20 & 21 Vict. c. 54, now represented by the 3rd section of the Larceny Act of 1861, it is not specifically put forward as the reason of the decision in the report in the Year Books, and two judges give a different reason for their decision, namely, that the original taking was felonious, as the carrier meant not to carry the goods according to the contract but to steal them. The case undoubtedly established the rule, whether or not it established the exception.

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The case was argued twice,—first in the Star Chamber before the Privy Council, and afterwards before the judges in the Exchequer Chamber. The Chancellor stated in the Star Chamber that the suit was brought by an alien merchant who had come into England with a safe-conduct, and who, he said, "is not bound to sue according to the law of the land, and to abide the trial by twelve men and other solemnities of the law of the land; but he ought to sue here, and it must be determined according to the law of nature in Chancery." He added that the law merchant was "ley universal par tout le monde," and was the law applicable to the case, and said that a misappropriation of goods in the possession of the offender was as felonious as if they were not in his possession.

This reasoning appears to confound the criminal liability of the carrier, which must have depended on the law of England, with the civil remedy of the owner of the goods, and admits that by the law of England a felonious taking was essential to larceny. But it must be observed that the Chancellor in 1474 was Booth, then Bishop of Durham, of whom Lord Campbell says, "His appointment turned out a great failure; he was equally inefficient in the Court of Chancery and in Parliament. Except that he did not take bribes, he had every bad quality of a judge." (1) He was, in a few months after this case, "dismissed from his office of Chancellor," on account of his incompetency. When the matter was discussed in the Exchequer Chamber, it was held by all the judges, except Nedham, that if goods are bailed to a man he cannot take them feloniously. The judges reported to the Chancellor and the Council that the majority of them thought a felony had been committed. Their reasons are not given in the report.

It thus appears that, whatever may be the exact effect of the case, all the judges except one considered that a felonious taking was essential to larceny, and that if the original taking was innocent no subsequent fraudulent dealing with the thing taken would amount to larceny. If the effect of the case is that a fraudulent breaking of bulk by a carrier amounts to a felonious taking, it established at most a special, anomalous, and highly technical exception to a rule which the exception itself emphati-

(1) Campbell's Lives of Chancellors, 5th ed. vol. i. p. 336.

cally recognises. There are other cases on the subject in the Year Books, but it is not necessary to go through them. The rule that in every theft there must be a felonious taking, or in other words a trespass, and that a fraudulent conversion after an innocent taking is not theft, is laid down by every text-writer who has dealt with the subject,—Coke (3rd Institutes, 107), Hale (1 Hale's Pleas of the Crown, 504), Hawkins (book I., chap. 19), Foster (Criminal Law, 123), and others, down to our time,—and has been recognised by many statutes which make exceptions to it in the case of embezzlement by servants, misappropriation by agents, and especially in the case of larceny by bailees. Indeed, my only reason for going so fully into the matter is to shew how characteristic and well established a part of the law the proposition in question is.

The application of this principle to the present case appears to me direct and obvious. Ashwell received the sovereign innocently, though he dealt with it fraudulently an hour afterwards, when he became aware of its value. The inference that he committed no felony at common law appears to me to follow of necessity.

There are two ways in which it is sought to avoid this inference. It is said, first, that the delivery being made under a mistake, passed neither the property in the sovereign nor the right to a possession of it, and that the prisoner must be regarded as having taken it, not when he accepted it under a mistake as to its value, but when knowing its value he determined to appropriate it to himself, or when he did so appropriate it by getting it changed and keeping the change. It is also said that even if no offence at common law was committed, the prisoner was guilty of larceny as a bailee under the 3rd section of the Larceny Act. I am unable to concur with either of these views.

The first view is, I think, contrary to principle, because it evades by a legal fiction the principle that a fraudulent appropriation consequent upon an innocent taking is not larceny. The guilt of the prisoner would follow easily and immediately from the principle that such a taking is larceny, and this second principle is in effect substituted for the first by an artificial interpretation either of the word "possession," or of the word "taking."

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If the word "possession" is chosen to be interpreted, this is done by explaining it to mean something beyond actual control over the thing possessed, namely, control coupled with knowledge, which may or may not exist. If the word "taking" is chosen to be interpreted, it is in this case interpreted to mean not an actual physical taking, but a subsequent change of mind relating back to such physical taking. I know of no authority for either of these fictions. The word "possession" is indeed used in many senses, some of them highly artificial, but this is a bad reason for adding a new artificial meaning to it. Its plain meaning in this case is the reception of the coin by Ashwell from Keogh. The interpretation suggested appears to me to be one against which there is express authority, which I now proceed to examine.

The cases which set the matter in the clearest light are those which relate to the finding of lost property, particularly those which have been decided in modern times. The earlier authorities laid down in general terms that to take lost goods fraudulently was not felony. Coke says (3rd Institutes, 108), "If one lose his goods and another finde them, though he convert them animo furandi to his own use, yet it is no larceny, for the first taking is lawfull." Hale (1st Pleas of the Crown, 506), says: "If A. finds the purse of B. in the highway, and takes it, and carries it away, and hath all the circumstances that may prove it to be done animo furandi, as denying it or secreting it, yet it is not felony."

The generality of these expressions was long afterwards qualified by cases which decided that if the owner was known to the finder at the time when he took the goods, the offence was larceny, and various distinctions and refinements were added to this general doctrine by five modern cases. These are *Reg.* v. *Thurborn* (1), decided in 1849; *Reg.* v. *Preston* (2), decided in 1851; *Reg.* v. *Christopher* (3), decided in 1858; *Reg.* v. *Moore* (4), decided in 1861; and *Reg.* v. *Glyde* (5), decided in 1868. These cases taken together appear to me to establish, with the utmost possible clearness, the proposition that in order to justify a conviction for larceny, the original taking, in the ordinary sense of the word,

(1) 1 Den. C. C. 387.
(2) 2 Den. C. C. 353.
(3) Bell, C. C., 27.
(4) L. & C. 1.
(5) Law Rep. 1 C. C. 139.

must be felonious, that a fraudulent misappropriation after an innocent taking is not theft, and that a change of mind after an innocent taking does not relate back to the innocent taking and make it felonious.

In *Reg.* v. *Thurborn* (1) the prisoner found a bank note and took it, intending to usurp the entire dominion over it, but at the time there was nothing to shew him to whom the note belonged, nor had he any reason to suppose the owner knew where to find it. Next day he heard and believed that the note belonged to the prosecutor, and after this he changed it and appropriated the money to himself. It was unanimously held by seven judges that this was not larceny, though the first taking was "not innocent in one sense." The effect of the judgment is summed up at page 397 as follows:—"If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense; and the question is, does that make a difference? We think not."

If this case is good law, and if the present case is to be decided against the prisoner, we shall have the following result: If A. finds a sovereign in the road not knowing to whom it belongs, and appropriates it to himself after discovering the owner, he is not guilty of theft; but if A. innocently receives a sovereign from the owner believing it to be a shilling, and appropriates it to himself after discovering its value, he is guilty of theft. This can hardly be the law.

When Ashwell received the coin and put it in his pocket, and for an hour afterwards, he did not know that Keogh was the owner of it in any sense whatever. He believed it to be his own, and that on the reasonable ground that Keogh had lent it to him, thereby passing to him an absolute property in the coin itself. When he discovered its value he had the lawful possession of it, at all events as against every one except Keogh; and if his subsequent conversion of it to his own use amounted to a felonious taking, *Reg.* v. *Thurborn* (1) was wrongly decided.

(1) 1 Den. C. C. 387.

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In one or two of the latter cases some dissatisfaction has been expressed at *Reg.* v. *Thurborn* (1) (see the observations of Martin, B., and Blackburn, J., in *Reg.* v. *Glyde* (2)); but this, I apprehend, refers not to that part of the decision which held that a fraudulent conversion after an innocent taking was not larceny, but to that part which held the same as to a fraudulent conversion after a taking which was in itself not innocent. The judges, however, in *Reg.* v. *Glyde* (2), said that they were bound by *Reg.* v. *Thurborn* (1), and it is recognised in several other cases as well.

The next case is *Reg.* v. *Preston* (3), decided in 1851, which appears to me to affirm the doctrine as to the necessity for an unlawful taking in the first instance in the most explicit manner. In this case a 50*l.* note had been lost by Collis. It had on it the name of Collis. The prisoner Preston changed the note two days afterwards, having in the meantime had notice that such a note had been lost by Collis. It does not appear how Preston became possessed of the note, whether by finding or otherwise. Mr. M. D. Hill, the Recorder of Birmingham, directed the jury, "that the important question for them to consider was at what time the prisoner first resolved to appropriate the note to his own use. If they arrived at the conclusion that the prisoner either knew the owner, or reasonably believed that the owner could be found, at the time when he first resolved to appropriate it to his own use, that is, to exercise complete dominion over it, then he was guilty of larceny. If, on the other hand, he had formed the resolution of appropriating it to his own use before he knew the owner or had a reasonable belief that the owner could be found, then he was not guilty of larceny." This was held by the Court to be a misdirection, as consistently with it the jury might have convicted the prisoner, thinking that he had taken the note innocently, and determined afterwards to misappropriate it. The judgments in this case appear to me to apply to the present case so closely that they must, if accepted as good law, be regarded as decisive of it. "Lord Campbell C.J.:—I am of opinion that this conviction cannot be supported. Larceny necessarily supposes a taking animo furandi. The rule as to taking is somewhat technical, but it is not likely to be departed from. In the case

(1) 1 Den. C. C. 387. (2) Law Rep. 1 C. C. 139.
(3) 2 Den. C. C. 353.

before us, the direction to the jury is consistent with an honest possession on the part of the prisoner. The recorder says that the question for them to consider was at what time the prisoner first resolved to appropriate the note to his own use. When, then, was the taking? It is supposed to be a thought which passed through the prisoner's own mind; but I do not think that can amount to a taking when nothing was in fact done, and when it may be that the prisoner was lying in bed at a distance from the article. There is no taking animo furandi in this case; consequently there is no larceny. It is unnecessary for us now to enter further into the question after the elaborate judgment of my Brother Parke on the subject of larceny in *Reg.* v. *Thurborn.* (1)" "Alderson, B.:—If there must be both a taking and the animus furandi to constitute larceny, the difficulty is, how the changing a man's mind ex post facto can render an honest taking larceny. According to the summing-up of the recorder to the jury, if a man gets a note honestly, keeps it for a week with an intention of restoring it to the owner, and then changes his mind and resolves to appropriate it to his own use, it may be, as the Lord Chief Justice remarks, while he is in bed, that converts a lawful taking into a dishonest one. To uphold such a doctrine would be to refine in such a way as to destroy the simplicity of the criminal law." "Talfourd, J.:—A mere movement of the mind cannot amount in law to a taking." "Platt, B.:—The case where there has been a bailment stands on a different principle—that of breaking bulk, but to constitute larceny, in every other case, something must be taken animo furandi and invito domino." "Martin, B.:—It is of great importance that the rules of the criminal law should be plain and intelligible; and considering that the prisoner may originally have become innocently possessed of the note, I do not think that this can be held to be a case of larceny." This case seems to me to be in all essential particulars identical with the present. The argument urged in support of the conviction of Preston was substantially the same as the view now under consideration. Lord Campbell states it thus (page 359): "Your position is that the finder, whilst he holds the property honestly, holds it for the

(1) 1 Den. C. C. 387.

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right owner, and that when he resolves to appropriate it to his own use there is a new taking, and that he then takes it animo furandi." This was the view from which the Court dissented. The only difference between the cases lies in the fact that in *Reg.* v. *Preston* (1) it did not appear how the prisoner got the note; whereas in the present case it appears that the prisoner got the coin from the prosecutor himself, and reasonably believed at the time that the prosecutor meant to give it to him for his own. This difference was surely in favour of Ashwell. In the one case nothing was proved as to the actual taking; in the other it was proved to have been altogether innocent. The judgments are also remarkable because they shew that in the opinion of the Court the felonious taking must be an actual physical taking, and that a change of mind as to the disposition of the property previously taken is not enough to constitute an unlawful taking. In 1858 *Reg.* v. *Christopher* (2) was decided. It is very like *Reg.* v. *Preston.* (1) The prisoner found a purse and money, and there was evidence that he heard soon afterwards that it was cried in the street. The prisoner afterwards converted the money. It was held that on this evidence he could not be convicted, as there was nothing to shew that at the time of finding the purse the prisoner knew whose it was, or that the owner could be found, though soon after taking it he learned who the owner was.

The next case is *Reg.* v. *Moore* (3), decided in 1861. In this case the prisoner picked up a bank-note in his shop, intending when he picked it up to take it to his own use and deprive the owner of it, whoever he might be, and believing at the time when he picked up the note that the owner could be found. After picking up the note and before appropriating it, the prisoner discovered the owner. It was held that this was larceny, because when the prisoner picked up the note he had a felonious intention; and the authority of *Reg.* v. *Thurborn* (4), was relied upon.

The last case as to finding is *Reg.* v. *Glyde* (5), decided in 1868. In this case the prisoner picked up a sovereign and determined

(1) 2 Den. C. C. 353.
(2) Bell, C. C. 27.
(3) L. & C. 1.
(4) 1 Den. C. C. 387.
(5) Law Rep. 1 C. C. 139.

to appropriate it, but there was no evidence to shew that at the time he had reason to believe that the true owner could be found though he discovered her shortly afterwards; and this was held not to be larceny.

These cases, no doubt, differ from the present in the circumstances that in all of them the prisoner got possession of the property by finding. Their bearing upon the present case is this: They all proceed upon the principle that in all larceny the actual physical taking must be felonious; and they decide the question whether this was so in particular cases of finding, by reference to the state of the prisoner's mind at the time of finding. They will be found to establish the following proposition:—If at the time of taking the lost property the finder intends to appropriate it to himself, and either knows or has the means of knowing the owner, or of knowing that he can be found, and subsequently appropriates the property, he is guilty of larceny; but if at the time of finding he either does not intend to appropriate the property, or does so intend without the knowledge or means of knowledge aforesaid, he is not guilty of larceny because his original taking is not felonious.

The question, therefore, reduces itself to this: What difference was there between the taking by a finder and the reception by Ashwell of the coin given him by Keogh? Whatever difference there was appears to me both in law and in common sense to be in Ashwell's favour. A finder must know that the property he finds is not his, whoever may be the owner of it. Ashwell for an hour after he received it reasonably believed that the coin which he received was his own. I cannot see how any taking could be more innocent, and to say that for the first hour his possession was Keogh's possession, and that when he determined to convert it he was guilty of a felonious taking, is expressly to contradict *Reg.* v. *Preston* (1), and is I think, inconsistent with the reasons for all the other decisions referred to.

There is, however, one short reason which appears to shew that it is impossible to regard Ashwell's conduct as felonious at common law. It is argued that he was a bailee of the sovereign. I do not think he was, but assuming that he was, for the sake of

(1) 2 Den. C. C. 353.

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argument, he could not be guilty at common law of larceny of the thing bailed. Assuming then that he was not a bailee, could he be guilty of larceny at common law? It seems to me that if a bailee who appropriated the thing bailed was not at common law guilty of larceny, Ashwell was not guilty à fortiori. A bailee knows what is bailed to him; he is under a direct obligation to deal with it in a particular way; he knows also who, as against him, is the owner of the goods. Ashwell took the coin under a reasonable belief that it was intended to become his own property, and that he incurred no other obligation to the man who gave it to him than that of paying back its equivalent. His taking was as innocent as a bailee's taking, and it involved no such responsibility as is incumbent on a bailee.

I may here notice one point which was raised in argument. It was said that the actual time of taking could not be the point at which the guilt or innocence of a finder must be determined, because in most cases a short time must elapse between the actual taking of a note or coin, the discovery of its nature or value, and the determination consequent upon that discovery to appropriate it; and this, it was said, shews that the time to be considered is the time of acquiring knowledge of the property taken, and not the time of taking. If a man picks up a purse containing money some seconds must usually pass before he can open the purse and discover and determine to appropriate the money. I think, however, that for legal purposes it is neither possible nor desirable to attempt to go into such a refinement as this. If a man finds a purse, picks it up, opens it, finds money in it, and thereupon determines to keep it for himself, it appears to me that the whole process ought to be regarded as one action, taking place at one time, as for many purposes the fractional parts of a day are not regarded by the law. If the examination were delayed for a substantial time, I think the question for the jury would be whether at the time of the taking the prisoner intended to keep what he had found, conditionally upon its turning out upon examination to be worth his while to do so, and whether at the time of taking the goods he had the means of knowing the owner.

Suppose, for instance, a man found a bank note bearing the

owner's name indorsed on it; suppose he put it in his pocket without examination, and ten minutes afterwards examined it, and after that kept it, it might be a fair inference that when he took it up he meant to examine it and to keep it if it was worth keeping. If by any means he could convince the jury that he took it up only to look at it, and changed his mind ten minutes afterwards, he would, I think, be entitled to be acquitted; but a jury would be likely to require strong evidence to induce them to believe in such a change of mind. In the present case it is admitted that the reception of the coin was quite innocent, and that the dishonest change of mind occurred upon the discovery by Ashwell of the mistake which was common to himself and Keogh.

The case is not destitute of authority bearing directly on its peculiar circumstances. In *Reg.* v. *Middleton* (1) a depositor in a post office savings' bank went to withdraw ten shillings from the bank. The clerk by mistake put down before him 8*l.* 16*s.* 10*d.*, which he, though at the time fully aware of the mistake, carried off. This was held to be larceny by eleven judges to four. The four judges who held that the case was not one of larceny did so on the ground that the taking was with the consent of the owner —a ground which certainly covers the present case. Of the eleven judges who confirmed the conviction, seven said "in the present case the jury have found that the prisoner had animus furandi at the moment of taking the money from the counter;" and they added, "the case is undistinguishable from the one supposed in argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this, whether he, at the time he took the sovereign was aware of the mistake, and had then the guilty intent, the animus furandi." Kelly, C.B., and Pigott, B., who delivered separate judgments, did not use this particular illustration, but their judgments proceeded on the same principle. It appears to me, therefore, that, according to the doctrine of all the fourteen judges in *Reg.* v. *Middleton* (2), the conviction in the

(1) Law Rep. 2 C. C. 38. (2) Law Rep. 2 C. C. 45.

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present case cannot be sustained at common law. *Reg.* v. *Middleton* (1) appears to me a highly important case, because the judges who decided it seem to have agreed in thinking that it marked the extreme point to which the law could be carried. Lord Bramwell, the present Master of the Rolls, Barons Martin and Cleasby, were of opinion that it was in that case carried too far. The majority decided on the same principle as the minority, but applied it somewhat differently.

In *Rex* v. *Mucklow* (2), decided in 1827, and *Reg.* v. *Davies* (3), decided in 1856, it was held that it is not larceny to appropriate a security inclosed in a letter which is received by a person for whom it was not intended, but to whom it was accidentally addressed. These are stronger cases than the present one, because the sovereign was intentionally delivered to Ashwell.

The only other case to be mentioned is that of *Merry* v. *Green*. (4) In that case a person purchased a bureau and found in it a secret drawer containing a purse and money, which he appropriated. It was held, that unless he had notice that the bureau was sold with its contents, he was guilty of larceny. This was put upon the ground that, though there was a delivery of the bureau, there was no delivery of the notes in it; a view which hardly seems consistent with the case of *Rex* v. *Mucklow* (2), as it is difficult to say why the delivery of a letter should operate as a delivery of notes inclosed in it, whereas the delivery of a bureau does not operate as delivery of its contents.

The case of *Merry* v. *Green* (4) seems to suggest the possibility of a kind of double finding; for instance, a man finds a pocket-book on one day, and some days afterwards examines it and finds in it a bank-note with the owner's name. The judgment in *Merry* v. *Green* (4) seems to suggest that the finding of the bank-note would take place when the pocket book was opened, not when it was found, and that though the possession of the pocket-book might be innocent the appropriation of the note might be felonious. However this may be, it has no application to the present case. There is, however, in *Merry* v. *Green* (4) a dictum ascribed to Baron Parke, which is referred to and explained by

(1) Law Rep. 2 C. C. 45.
(2) 1 Moo. C. C. 160.
(3) Dears. C. C. 640.
(4) 7 M. & W. 623.

him in *Reg.* v. *Thurborn.* (1) The result of the dictum and the explanation taken together, is, I think, that if a man finds property and takes it to look at it, and afterwards finds marks on it shewing who is the owner, the trespass essential to larceny is committed when he discovers the owner, and not when he takes up the property. If this dictum refers to a continuous act it is in agreement with the whole course of authority. If it is meant to express that when a man innocently takes found property, and afterwards discovers who is the owner, and then converts it, he is guilty of larceny, it is opposed to the cases already noticed, and especially to the judgment in *Reg.* v. *Thurborn* (1) itself. Such as it is, this dictum is the only authority I have found in favour of the view under consideration.

For all these reasons, I think that in this case there was no larceny at common law, because the original taking was innocent, and with the consent of the owner, under a mistake made by himself only, and in no way produced by Ashwell.

As to the point about bailment, I agree with the judgments which have been already read, which I had not seen at the time I wrote my judgment. I think the conviction should be quashed.

HAWKINS, J. I concur generally in the judgment of my Brother Cave; and it follows that I think this conviction ought to be affirmed.

MANISTY, J. I almost feel that I may be taking up time somewhat unnecessarily after the elaborate, and, if I may say so, very able judgment pronounced by my Brother Stephen; but the case is of considerable importance; and there are one or two observations which I should like to add.

It seems to me that the form of indictment is in accord with all the authorities which have been cited as to the definition of larceny, and that every one of the allegations in that indictment must be proved before the prisoner can be convicted of larceny. The form of indictment, is, that the prisoner did feloniously steal, take, and carry away the property in question. Now, in this case the jury have negatived the allegation that he, at the time he took it, did steal, or take it or carry it away feloniously. They

(1) 1 Den. C. C. at p. 395.

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have negatived that, because they find that the prisoner did not know it was a sovereign at the time he received it. It seems to me that the jury could not properly find the prisoner guilty of larceny, and that their findings amounted to a verdict of not guilty, because they find that he took it honestly, and afterwards fraudulently appropriated it.

It seems to me that it is an unfortunate thing to depart from that which has been decided solemnly to be the law, especially in a criminal case. Now the case of *Reg.* v. *Middleton* (1), unless it is overruled, covers this case, because there it was found by the jury that the prisoner took the money and went away, having at the moment of taking it an animus furandi, and knowing the money to be the money of the Postmaster General; and all the judges say that the question is—at the time when the prisoner took the money did he take it having at that moment an animus furandi?

I may add this—that the real remedy—and it is a very important part of this case—the real remedy of the prosecutor was to bring an action to recover nineteen shillings out of the twenty as money had and received for his use, and to recover back the shilling, which the prisoner undertook to repay the next day as money lent. The prisoner had a right to take that sovereign and change it and take a shilling out of it, and to return the nineteen shillings. It may be said that is technical; but it seems to me that, if it were necessary to decide the case upon that point, I should be inclined to hold that the taking of it was lawful, and the possession of it was lawful.

With regard to the question of bailment, it seems to me that it required an Act of Parliament to make it an offence, because there was lawful possession, and subsequent fraudulent appropriation.

It seems to me, on all grounds, both on principle and authority, this conviction ought to be quashed.

FIELD, J. I am also of opinion that the conviction cannot be supported, and that, upon the evidence stated in the case, the prisoner has not been guilty of any crime punishable by law.

I have had the advantage of reading and considering the

(1) Law Rep. 2 C. C. 38.

opinions and authorities relied upon, as well of my learned Brethren who have preceded me in giving their judgment, as that of my Lord, and my Brother Cave, whose judgment my Lord has already read.

I have for myself, according to the best of my ability, examined and compared the authorities and the arguments on one side and on the other, and, having done that, I have arrived at the conclusion which I have stated. I find the principles and authorities in support of that view have been stated so fully and so clearly by my learned Brethren who have adopted the same view in their judgments that I do not think it would be at all to the public advantage that I should go through the same grounds.

The prisoner has, undoubtedly, been guilty of very fraudulent conduct, and if by law he ought to be punished, I should, of course, be glad to perform my duty and affirm this conviction; but I must not, because I think he has been guilty of fraudulent conduct, make that a crime which, in my humble judgment, the law has not declared to be a crime.

Therefore, for those reasons, I think the conviction cannot be supported.

DENMAN, J. Having tried this case, I think it right to add a few words, though I might have, probably, equally done my duty by saying that I entirely concur, after full consideration, with the judgment of my Brother Cave; and I may also say that I have had the advantage of reading a judgment which has been prepared by the Lord Chief Justice; and I believe it will be found that that is entirely in accordance with that of my Brother Cave, though there are one or two observations in it which tend to fortify the conclusion at which my Brother Cave has arrived. I may say that, if I thought that this case was covered by any previous decision of the Court of Criminal Appeal, I should at once bow to authority; but I think that the judgments that have been delivered are conclusive to shew that this was a case open to very considerable doubt, and it is impossible to say that any one case is so in point as to govern this case.

With reference to the findings, I think it right, inasmuch as the language was my own, to say that the questions were put with studious care to the jury, in order not to conclude the question

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of whether there was a felonious taking. The jury found that the prisoner did not know that it was a sovereign at the time he received it. A neutral word was expressly used to indicate only that he had it handed to him. Then the jury said they were unanimously of opinion that the prosecutor parted with it under the mistaken belief that it was a shilling—not that he handed it over in any such sense as to make it a taking one way or the other at that time by the prisoner; that the prisoner, having, soon after he received it (in the same sense) discovered that it was a sovereign, could have easily restored it to the prosecutor, but fraudulently appropriated it to his own use; and those studiously neutral words were also used in order that it might be for the Court to say afterwards whether there was evidence of felonious taking at that time—at the time of the appropriation. The question, therefore, which was intended to be left for the Court of Criminal Appeal was, whether, upon those findings upon the facts of this case, there was evidence upon which the jury might properly find the prisoner guilty of taking animo furandi —that is to say, of stealing that sovereign.

At the time when the case was tried, if I had been compelled then and there to give my decision, I was inclined to think that the case was covered by authority; but it was in deference to a doubt expressed by my Brother Stephen in his valuable work, in which he says, it is doubtful whether it is theft fraudulently to convert property given to the person converting it, under a mistake of which that person was not aware when he received it, that I thought it right to reserve a case.

Now I wish, very shortly, to state the ground upon which I think that this was larceny. I quite agree in the definition of larceny—in fact I do not know that there is any dispute about it. The question is whether the person charged has feloniously stolen taken and carried away property, and in this particular case the question turns upon whether there was a felonious taking.

It has been put in this way—that here there was a fraudulent appropriation after an innocent taking. That seems to me to be not the true test to apply in this case, on this ground, that at the time at which the sovereign was mistakenly handed over by the prosecutor to the prisoner, it was impossible that the question of animus furandi could be raised, for the simple reason that the

prosecutor never intended to part with a sovereign; nor did the prisoner ever believe that he was receiving a sovereign. I think, a great deal of the difficulty of this case has arisen from applying the ambiguous word "take," to the receipt of a thing handed over by mistake. At the time of the handing over there was nothing to make the prisoner know that he had got a sovereign. He assumed that it was a shilling. That being the state of things, I have come to the conclusion that the case falls within the authority of those cases in which it has been held that where a man finds property, and at the time at which he finds it has the full means of knowing whose it is, with full power at once to disgorge it, and perfect knowledge that it was not intended for him, and then fraudulently appropriates it, there is larceny, and the taking is at the time of fraudulently appropriating it.

I see no stretching of the law in applying the same principle here which was applied in *Reg.* v. *Thurborn* (1), and that being so, I think the conviction can be supported.

LORD COLERIDGE, C.J., read the following judgment.

I have had the advantage of reading the judgment prepared in this case by my Brother Cave, and in so much of his judgment as relates to the question of larceny at common law I entirely concur. I think it very doubtful, indeed, if this conviction could be supported on the ground that there was any bailment of the sovereign to the prisoner. I much doubt if there was in this case any bailment at all. I was one of a considerable minority of judges on the second argument of *Reg.* v. *Macdonald* (2), and my opinion was, and is, that bailment is not a mere delivery on a contract, but is a contract itself. Sir William Jones speaks of it as that *contract* which the lawyers call bailment. (Sir William Jones on Bailment, p. 1.) "Bailment or delivery of goods to another person for a particular use;" says Sir William Blackstone, (2 Bla. Com. p. 396). "Bailment is a compendious expression to signify a contract resulting from delivery;" (Story on Bailments, p. 1.) Twice over in Story on Contracts, ss. 680–681, the author speaks of bailment as itself a contract. "Depositum (that is, bailment) is a contract;" says Grotius in his introduction to Roman-Dutch law,

(1) 1 Den. C. C. 387. (2) 15 Q. B. D. 323.

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Depositum, s. 2. "The contract of bailment" is not a mere loose and common phrase, but is the accurate expression of a legal idea; and I must confess it appears to me it would be doing some violence to the plain facts of this case to hold that there was any implied contract (there certainly was no express contract) of bailment between the prisoner and Keogh.

On the question as to larceny at common law, I desire to add only a few words, and to call attention to a case to which my attention has been called by a gentleman at the bar, which was not mentioned in the argument; possibly because it was one which did not exactly suit the views of either party to that argument. I assume it to be now established law that where there has been no trespass, there can at common law be no larceny. I assume it also to be settled law that where there has been a delivery—in the sense in which I will explain in a moment—of a chattel from one person to another, subsequent misappropriation of that chattel by the person to whom it has been delivered will not make him guilty of larceny, except by statute, with which I am not now concerned. But then it seems to me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law any more than in sense a delivery and receipt, unless the giver and receiver intend to give and to receive respectively what is respectively given and received. It is intelligent delivery, as I think, which the law speaks of, not a mere physical act from which intelligence and even consciousness are absent. I hope it is not laying down anything too broad or loose, if I say that all acts, to carry legal consequences must be acts of the mind; and to hold the contrary, to hold that a man did what in sense and reason he certainly did not, that a man did in law what he did not know he was doing and did not intend to do—to hold this is to expose the law to very just but wholly unnecessary ridicule and scorn. I agree with my Brother Stephen that fictions are objectionable, and I desire not to add to them, but it seems to me, with diffidence, that he creates the fiction who holds that a man does what he does not know he does and does not mean to do, not he who says that an act done by an intelligent being for which he is to be responsible is not an act of that being unless it is an act of his intelligence. If it had been so decided by authority which binds

me, of course I should submit, but if it has not been so decided, I take the freedom to say that it is not law—at least yet. In this case, therefore, it seems to me, there was no delivery of the sovereign to the prisoner by Keogh, because there was no intention to deliver, and no knowledge that it had been delivered.

Applying the same principles of reasoning, it appears to me that the sovereign was received by the prisoner and misappropriated by him at one and the same instant of time. In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it. According to all the cases, if at the very moment of the receipt of a chattel the receiver intends to misappropriate and does misappropriate it, he is guilty of larceny. I think for the reasons I have given, and in the sense I have defined, the prisoner did so here: and this seems to me, with great deference to my Brother Smith, to be the answer to the exceedingly able and ingenious passage in his judgment in which he says that it is a fallacy to confound two things so utterly different as the discovery of a mistake and the stealing of a chattel. I do not shrink from the conclusion, which seems to me good sense, that sometimes the discovery of a mistake and the stealing of a chattel may be the same, or rather may be two forms of words equally descriptive of the same facts, if, as here, the chattel is really discovered and stolen at one and the same instant of time.

This would be my view if the case were bare of authority, and the matter were res integra. But it is not res integra, and there is abundant authority. On this part of the case I concur with my Brother Cave. I think we cannot reverse this conviction without practically overruling Lord Eldon in *Cartwright* v. *Green* (1), the Court of Exchequer in *Merry* v. *Green* (2), and the dicta cited by my Brother Cave from the judgment of the majority of the judges in *Reg.* v. *Middleton.* (3) I can see no sensible or intelligible distinction between the delivery of a bureau not known to contain a sum of money or a purse and the delivery of a piece of metal not known to contain in it 20*s.*; and the passage in the judgment of Sir A. Cockburn, which was assented to by the majority of the judges in *Reg.* v. *Middleton* (3), appears to me, as it does to my Brother Cave, to be decisive of this case.

(1) 8 Ves. 405. (2) 7 M. & W. 623. (3) Law Rep. 2 C. C. 38.

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Lord Coleridge, C.J.

It remains only for me to call attention to *Reg.* v. *Riley* (1), the case which I mentioned at the beginning of my judgment. In that case a man had without intending it, and innocently, driven off a lamb belonging to another man with a flock belonging to himself. Some time afterwards he discovered the mistake, and sold his own flock and the lamb that was not his own to a purchaser. It was held that he was guilty of larceny of the lamb. The case was tried in 1852, when the law of the replication de injuriâ decided in *Crogate's Case* (2), and the distinction between case and trespass decided in *Scott* v. *Shepherd* (3), still commanded the assent, indeed the veneration, of Westminster Hall. And the ground on which the conviction was supported was that there had been a trespass in driving off the lamb, however innocently, that by the sale the trespass became felonious, and I suppose felonious ab initio, to bring it within the definitions given in *Reg.* v. *Thurborn.* (4) The Court there upheld the conviction on a ground extremely technical. If the owner of the lamb had been present when it was driven off, and believed it to be one of the prisoner's flock, according to the present argument the conviction in *Reg.* v. *Riley* (5) must have been quashed. I cannot think it would have made any difference, and the case as it stands is an authority under circumstances hardly different from those in the present case for upholding this conviction. I am therefore of opinion that the conviction was right.

In the judgment I have pronounced I am desired to say that my learned Brothers Grove, Pollock, and Huddleston concur. There are, therefore, seven for affirming the conviction and seven for quashing the conviction, and by the well-known rule of this Court, praesumitur pro negante, the conviction stands.

Conviction affirmed.

Solicitors for prosecution: *Robinson, Preston, & Stow, for Berridge & Miles, Leicester.*

Solicitor for prisoner: *Solicitor for the Treasury.*

(1) Dears. C. C. 149.
(2) 8 Rep. 66 b.
(3) 2 Wm. Bl. 892.
(4) 1 Den. C. C. 387.
(5) Dears. C. C. 149.

A. M.

[IN THE COURT OF APPEAL.]

1885
Dec. 17.

IN RE AN ARBITRATION BETWEEN ALICE WADHAM AND OTHERS AND THE NORTH EASTERN RAILWAY COMPANY.

Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18)—*House "injuriously affected"—Special Value as a Public-house—Compensation.*

APPEAL of the North Eastern Railway Company from the judgment of the Queen's Bench Division (1) on a special case stated by an arbitrator under the Lands Clauses Act, 1845.

May 7. *Sir Farrer Herschell, S.G.* (*Meysey-Thompson*, with him), for the appellants.

A. Charles, Q.C. (*A. Cock*, with him), for the respondents.

THE COURT (Brett, M.R., and Baggallay, and Bowen, L.JJ.), without fully hearing the argument for the appellants, remitted the case to the arbitrator to ascertain how he arrived at the sums mentioned in his award.

The arbitrator afterwards made a report for the information of the Court of Appeal, which stated as follows:—"In arriving at the amount of 650*l.*, I assessed the value of the premises known as the Royal Hotel, and of the dwelling-house and shop adjoining thereto, and the lands and hereditaments held and enjoyed therewith, as if there had been a restrictive covenant preventing the premises known as the Royal Hotel being used as an hotel or public-house. I so assessed the value of the premises because the counsel for the North Eastern Railway Company who appeared before me in the arbitration insisted that I was bound by authority not to consider any particular use to which the premises known as the Royal Hotel might be applied, and asked me to make my award in the alternative. In arriving at the further sum of 900*l.* I considered that the hotel premises were from their construction and situation specially suitable to be let or sold as premises to be used as an hotel and public-house. I looked at the fact that the premises known as the Royal Hotel were being, and had been

(1) 14 Q. B. D. 747.

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for some time, used as an hotel and public-house, as part of the evidence that such premises were suitable for being used as an hotel and public-house, but I did not take into account in assessing the said sum of 900*l.* the depreciation in the value of the licence, or the loss in the trade then being carried on upon the premises, and I did not include in the 900*l.* any element of compensation for which I had made allowance in arriving at the sum of 650*l.* I considered that if after the execution of the authorized works by the North Eastern Railway Company, the whole of the premises in respect of the injury to which compensation had been awarded, had been put up for sale to be used for any purpose for which they were suitable, the premises known as the Royal Hotel being treated as unlicensed, the whole of the premises would have fetched in the market 1550*l.* less than they would have fetched if such works had not been executed."

Dec. 17. *Sir F. Herschell, Q.C.* (*Meysey-Thompson,* with him), stated that in consequence of this report he declined to further argue the case for the appellants.

A. Charles, Q.C. (*A. Cock,* with him), asked to have the appeal dismissed, and

THE COURT (Lord Esher, M.R., Cotton and Bowen, L.JJ.), dismissed the same accordingly.

Appeal dismissed.

Solicitors for appellants: *Williamson, Hill, & Co.*

Solicitors for respondents: *Iliffe, Russell, Iliffe, & Cardale.*

W. P.

BROWN *v.* LIELL. 1885 Oct. 27.

Practice—Discovery—Production of Documents for Inspection—Documents in which Parties have a common Interest—Security for Costs—Order XXXI., rr. 25, 26.

Order made that the plaintiff in an action of contract should have inspection of the written contract which was in the defendant's possession without giving the security for costs required by Order XXXI., rr. 25, 26.

The provisions of Order XXXI., rr. 25, 26, with regard to security for the costs of discovery do not apply to an application for production of a document in which both parties to the action have a common interest.

APPEAL from the order of Day, J., at chambers.

The facts were in substance as follows:—

The plaintiff sued for the contract price of goods sold and delivered. The defendant in his defence stated that the plaintiff had only delivered a portion of the goods specified by the contract, for which portion payment had been made, and that the remainder of the goods alleged to have been delivered were not in accordance with the contract. The terms of the contract for the sale of the goods were in writing, and the written document being in the defendant's possession the plaintiff applied to a master at chambers for an order for inspection of the same. The document was not referred to in the pleadings. The plaintiff had not previously to such application paid into court any sum of money as security for costs, in accordance with Order XXXI., r. 26. The master refused the application, but on appeal, Day, J., made an order for production of the document for the plaintiff's inspection.

C. J. Peile, for the defendant. By Order XXXI., r. 26, when discovery otherwise than by interrogatories is sought, before making the application money must be paid into Court as security for the costs of discovery.

[MATHEW, J. The plaintiff would, according to the old practice at common law, independently of any statutory provision, have been entitled to inspection of this document as forming the basis of the action, and being one in which he had a common interest with the defendant. Where the rules make no contrary provision the old practice continues: Order LXXII., r. 2.

SMITH, J. The plaintiff is not asking for discovery, but for

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inspection only of a document which he knows the defendant to have in his possession, and in which both parties have a common interest.]

It is submitted that inspection is included in the terms "discovery otherwise than by interrogatories." There seems to be no reason why r. 26 should not apply to the costs of inspection.

W. E. Ball, for the plaintiff, was not called upon.

MATHEW, J. It seems to me that the application made in this case was not an application for discovery within rr. 25 and 26. My Brother Day decided in accordance with the old practice established before any statutory powers with regard to discovery and inspection were conferred upon the Courts of common law. On that ground I should be of opinion that his order was right, and should be affirmed, and it is only necessary to refer to the case of *Price* v. *Harrison*. (1) Assuming, however, that the rules did apply, under Order XXXI., r. 25, the judge has power to dispense with the security for costs, and, if he thought that the defendant was a trustee of the document for the plaintiff, and therefore ought to allow inspection, he might reasonably think that a sufficient ground was made out for dispensing with the security. It therefore seems to me clear that this appeal should be dismissed. But I rest my judgment on the ground that, where one party has a document in his possession in which both parties have a common interest, as for instance a document containing the terms of the contract sued upon, and the other party seeks inspection of such document, he is entitled to discovery at common law and independently of the new rules. The case is clearly not within the mischief of rules 25 and 26, which were intended to check applications for discovery which might be unreasonable or unnecessary.

SMITH, J., concurred.

Appeal dismissed. (2)

Solicitor for plaintiff: *W. Handel Cannon.*

Solicitor for defendant: *Henry Bracey Forbes.*

(1) 8 C. B. (N.S.) 617.

(2) See *China Steam Co.* v. *Commercial Assurance Co.*, 8 Q. B. D. 142; *West of England, &c., Bank* v. *Canton Insurance Co.*, 2 Ex. D. 472; *Law* v. *Budd*, W. N. 1883, p. 166.

E. L.

1885
Oct. 30.

TANNER, APPELLANT; CARTER, RESPONDENT.
BANKS AND OTHERS, APPELLANTS; MANSELL, RESPONDENT.

Parliament—Borough Vote—Universities of Oxford and Cambridge—Occupation of College Rooms—Regulations prohibiting Residence during Vacations—Registration Act, 1885 (48 *Vict. c.* 15)—*Reform Act* (2 & 3 *Wm.* 4, *c.* 45), *s.* 78—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-s.* 2.

Students in the universities of Oxford and Cambridge, who occupy rooms in their colleges under regulations which do not allow them to reside in or visit their rooms during the vacations without the express permission of the college authorities, are not entitled under the Representation of the People Act, 1867, to be registered as voters in respect of such occupation.

CASES stated by the revising barristers for the parliamentary boroughs of Cambridge and Oxford.

The case "*Tanner* v. *Carter*" related to the university of Cambridge, and was in substance as follows:—

Albine Carter objected to the name of the appellant being retained in the list of parliamentary voters for the borough of Cambridge as an inhabitant occupier of a dwelling-house within the borough.

The appellant is a student attached to one of the colleges in the university of Cambridge. He is of full age, and has occupied a set of rooms in college for the qualifying period at a yearly rent payable by three terminal payments. The rates are paid by the college and are charged to the appellant with the rent. The rooms are furnished and kept in internal repair by the appellant.

There is no express agreement with respect to the hire of the rooms.

The rooms have an outer door opening on to a common staircase. There are two keys to this door, one in the possession of the appellant, the other in the custody of the college servant, called a bed-maker, who attends to the rooms. By the latter key the college authorities obtain access to the rooms when required. The appellant is required to employ the college servants to attend upon him in the rooms.

The rooms form part of the college buildings, which are approached from the street by an outer gate, of which the college

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authorities have the control. The appellant is not permitted to go out or to bring friends into the college by this outer gate after 10 P.M.

The appellant is subject to the discipline of the college. It is a breach of such discipline for a student of the college to remain out of college after midnight. Students are not permitted to reside in or to visit their rooms during the vacations, which extend to about half the year, without the express permission of the college authorities. During such vacations the rooms are occasionally used by the college authorities for visitors for short periods without the express consent of the students; when used for long periods such consent is usually obtained.

Students are liable to be removed from rooms without notice, for misconduct or breach of the rules of the college.

No married student is permitted to reside in the rooms with his wife.

By the Cambridge Award Act, 1856 (19 & 20 Vict. c. xvii.), it is provided by s. 24, that "as respects college property the whole thereof shall be deemed to be in the occupation of the college, although parts may be exclusively occupied by individual members or students."

It was contended by the respondent that by reason of this enactment there could be no occupation of college property by students; secondly, that the appellant was not an inhabitant occupier as tenant of a dwelling-house within the meaning of s. 3, sub-s. 2, of the Representation of the People Act, 1867.

It was contended by the appellant that such occupation was rendered unnecessary in the case of the appellant by reason of the proviso contained in s. 15 of the Registration Act, 1885; secondly, that the appellant was an inhabitant occupier as tenant of a dwelling-house within the borough within the meaning of s. 3, sub-s. 2, of the Representation of the People Act, 1867.

The barrister decided that the appellant was not an inhabitant-occupier as tenant of a dwelling-house within the meaning of s. 3, sub-s. 2, of the Representation of the People Act, 1867, and expunged the name of the appellant from the list.

The case *Banks* v. *Mansell*, which related to the university of Oxford, was in substance as follows:—

J. H. Mansell objected to the names of the appellant and others

being retained in the list of parliamentary voters for the borough of Oxford.

1. Every name objected to was that of an undergraduate occupying rooms in a college or hall of the university of Oxford.

1A. No formal agreement for a tenancy was entered into between the college and the undergraduates, but in some of the colleges printed copies of the college regulations were supplied to the undergraduate when he came into residence.

2. No notice to quit was given by either side previous to the surrender of a set of rooms.

3. The colleges reserved to themselves the right to enter an undergraduate's room when they thought fit, and in Balliol College the right was claimed (to be exercised with reason) of using the rooms for academical purposes, such as a college meeting or lecture.

The general right was qualified in the case of Queen's College, where it existed only in the person of the junior bursar acting as landlord on behalf of the college for landlord purposes.

4. Rent.—In every college an annual rent was paid by the undergraduate by three terminal payments, i.e., at Easter, Midsummer, and Christmas.

5. Rates were paid for the whole of the year in every instance by the undergraduate either directly or indirectly, and in some colleges, where the value of the rooms permitted, the inhabited house duty as well.

6. The undergraduate was also charged in one form or another for repairs and dilapidations.

7. Furniture.—In some of the colleges this was the exclusive property of the college, and a charge for it was included in the rent, but undergraduates were allowed to make their own additions, while in other colleges they furnished their rooms themselves.

In Balliol an undergraduate could not even add to his furniture without permission of his college.

8. A servant was attached to each set of rooms, and was provided with a key which enabled him to enter the rooms as he pleased.

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The servant was supplied by the college, and the undergraduate had no voice in his selection.

9. At the end of each term the undergraduate was required to vacate his rooms, and in the same way when the term began he was required to return to them.

During term he could not leave his rooms so as to go outside the college after 9 P.M., nor could he enter the college so as to get to his rooms after 9 P.M., except by payment of a fine, which was increased in amount according to the lateness of the hour that he chose to return.

10. Vacation.—During vacation an undergraduate could not reside in his rooms without permission, but he was allowed to keep in them his furniture and personal effects, and in that sense to occupy them.

It was usual in vacation for the college authorities in some instances to lend an undergraduate's rooms to visitors without asking leave of the undergraduate, this consent being taken for granted, and in one college (Wadham) an instance was given where an undergraduate was refused permission to occupy his rooms in vacation on the ground that they had been thus lent by the college. And in another (Keble) it was usual in the long vacation to lend all the rooms in the college to members of the Diocesan Conference, without in any way consulting the undergraduate occupants.

12. In every college the tenure of an undergraduate's rooms was subject to good behaviour and the requirements of discipline, of which the college authorities constituted themselves the sole judges.

It was proved in the case of every name objected to, that the undergraduate in point of fact did not and could not without leave occupy his rooms during vacations, and that these vacations, of which there were three, comprised a period of something like six months in the year.

During these vacations an undergraduate was allowed to occupy his rooms by means of his furniture and personal effects, and in some cases he could retain the key, but it was also proved that his control over the key and his personal effects were qualified by

the fact that he could not use the one or touch the other without permission.

The barrister decided that the appellants were not "inhabitant occupiers" of dwelling-houses within 30 & 31 Vict. c. 102, s. 3, sub-s. 2.

R. Henn Collins, Q.C., for the appellant in the case relating to the university of Cambridge. Sect. 15 of the Registration Act, 1885, in express terms enables members of the universities to vote for Oxford or Cambridge as occupiers of chambers. For this purpose it repeals the proviso in 2 & 3 Wm. 4, c. 45, s. 78, and the Cambridge local Act, 1856. (1) It is expressly found in the case, that the appellant has occupied a set of rooms for the qualifying period at a fixed rent, and this is sufficient to make him an inhabitant occupier within the Representation of the People Act, 1867. The fact that the college authorities retain the key of the rooms and have control over the outer gate, is merely a part of their discipline, and is not inconsistent with an occupation as tenant. In *Barnes* v. *Peters* (2) it was held that a set of rooms in a college at Oxford or Cambridge was a dwelling-house within 30 & 31 Vict. c. 102, s. 3, sub-s. 2, and that the occupier was not entitled to vote as a lodger, Bovill, C.J., saying: "It could not be denied that these rooms were dwelling-houses within the decisions, and the occupiers therefore would have been entitled to vote as occupiers." The compulsory absence of the undergraduate during the vacation is in pursuance of a regulation which is part of the college discipline, and it is no interruption of the tenancy. In the case of students occupying lodgings out of college, a similar regulation exists.

(1) 2 & 3 Wm. 4, c. 45, s. 78: "Provided always, that nothing in this Act contained shall extend to or affect the election of members to serve in parliament for the universities of Oxford or Cambridge, or shall entitle any person to vote in the election of members to serve in parliament for the city of Oxford or town of Cambridge, in respect of the occupation of any chambers or premises in any of the colleges or halls of the universities of Oxford or Cambridge."

The Registration Act, 1885 (48 Vict. c. 15), s. 15: "From and after this Act s. 78 of 2 & 3 Wm. 3, c. 45, is repealed: Provided that no person shall be prevented by any other Act from being registered as a parliamentary voter in respect of his occupation of any chambers or premises in any of the colleges or halls of the universities of Oxford or Cambridge."

(2) Law Rep. 4 C. P. 539.

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Crump, Q.C., for the appellants in the case of the university of Oxford.

Moulton, Q.C. (*Cockerell* with him), for the respondent in the case of Cambridge University, and *Asquith*, for the respondent in the case of Oxford University, were not heard.

LORD COLERIDGE, C.J. In cases relating to the qualification of members of the two universities some interesting questions may arise, but the present case appears to me quite free from difficulty. This point is not affected by any special legislation. The Reform Act, 2 & 3 Will. 4, c. 45, s. 78, did indeed enact that members of these universities should not be qualified to vote by their occupation of chambers in any college or hall. But s. 15 of the Registration Act, 1885, has repealed this section and provided that no person shall be prevented by any other Act from being registered as a voter in respect of his occupation of such chambers. This last provision includes any Act such as the Cambridge Award Act, which has been referred to during the argument. But all that the Registration Act does is to leave the occupiers of these chambers in the same position as other persons who occupy houses, and in the case of ordinary occupiers one of the incidents of the right to vote is that there shall have been an unbroken residence for the prescribed period. Sect. 15 of the Registration Act in fact enables occupiers of chambers in the universities to acquire a right to vote, and in the case of fellows of colleges, and other persons who reside continuously, it would have a direct application. But in the case of ordinary undergraduates the removal of the particular disqualification under which they laboured does not also remove the disqualification created by the general law. It is admitted that during the vacations they cannot inhabit their rooms without the leave of the college authorities, and that it rests with these authorities to say for how long a period they may be admitted to live in them during the vacations. So that without saying that it is impossible for undergraduates to acquire a right to vote by complying with the conditions imposed by the legislature, it is clear that the mass of them cannot comply with these conditions, and are not entitled to vote.

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GROVE, J. I am of the same opinion. Mr. Collins in the Cambridge case relied on the finding of the revising barrister, that the appellant had occupied a set of rooms in college for the qualifying period at a yearly rent. No doubt in a certain sense he occupied the rooms, but when we read on we find that under the discipline of the college, students are not permitted to reside in their rooms during the vacation without the express permission of the college authorities. This permission may be occasionally given, but as a rule students are absent during the whole vacation, and their absence is compulsory. We have therefore a definite period during the year in which they are not entitled to occupy. I do not say that a mere incidental or occasional absence from the rooms would constitute a break in the occupation where the absence was not compulsory, but here it is compulsory. It is part of the implied contract by which the student becomes a member of the university, and it is a contradiction in terms to say that he has been an occupier for twelve months, when by the contract he was to occupy for six months only.

CAVE, J. I am of the same opinion. I quite agree that it is impossible that s. 15 of the Registration Act, 1885, can have any greater effect than this—that it places gentlemen who occupy chambers in the colleges at Oxford and Cambridge upon the same footing as those who occupy other dwelling-houses. In the cases before us it could not be contended that the students actually occupied rooms in their respective colleges during the whole of the qualifying period. But it was contended that they constructively occupied their rooms during the whole of this period. Undoubtedly there have been cases, in which it has been held that there may be a constructive as distinct from an actual occupation of a dwelling-house. But when these cases are examined, it will be found that the person held to be constructively resident in a house was always entitled to return to it without requiring the consent of any other person. It is quite clear that these students had no such right. They could not have returned to their rooms during the vacation without the consent of the college authorities, and I must say that I cannot distinguish their case from that of a man who, before 41 Vict.

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c. 3, had let his premises as a furnished house during the qualifying period for a period not exceeding four months. What is the difference between such a case and that of the undergraduate who places his rooms out of his possession and power, and parts with the right to return to them during a definite period? The authorities as to constructive residence have no application as soon as it is shewn, that the occupier cannot return to the premises during part of the year at his own option, but in order to return must obtain the permission of some other person.

Judgment for the respondents.

In *Tanner* v. *Carter.*

Solicitors for appellant: *Foss & Ledsam, for J. E. L. Whitehead, Cambridge.*

Solicitors for respondent: *Deane & Nash, for Ginn & Matthew, Cambridge.*

In *Banks* v. *Mansell.*

Solicitors for appellants: *Stretton & Hilliard, for Challenor & Son, Abingdon.*

Solicitor for respondents: *G. D. D. Dudley, Oxford.*

A. P. S.

ADAMS, APPELLANT; FORD, RESPONDENT.

1885
Oct. 31.

Parliament—Borough Vote—Representation of the People Act, 1884 (48 *Vict.* c. 3), s. 3—*Inhabitant Occupier of Dwelling-house—Industrial Trainer in Workhouse—Right of voting—Master of Workhouse—Use of Board Room by Guardians.*

The appellant was an industrial trainer in the employment of poor law guardians, and as part of his salary was allowed to have the exclusive occupation of a sitting-room and bed-room in the main building of the workhouse. The guardians reserved another room in the workhouse which they used as a board-room; the master of the workhouse, whom they employed, resided in other rooms in the building. The appellant could not stay out of his rooms after 9 p.m. without the permission of the master; the master, however, had no power to suspend or dismiss him if he did so, but could only report the matter to the guardians:—

Held, that the appellant was an inhabitant occupier of a dwelling-house by virtue of his employment, within 48 Vict. c. 3, s. 3—for the workhouse was not in the circumstances inhabited by the guardians, and he did not serve under the master of the workhouse so as to disqualify him from voting.

CASE stated by the revising barrister for Exeter on objection to the name of the appellant being retained on the list of voters for the borough.

1. The name of the appellant appeared on the list as occupier of a dwelling-house in the Okehampton Road.

2. The appellant is an industrial trainer appointed, paid, and employed by the guardians of the poor for the parish of Saint Thomas the Apostle.

3. As part of his salary the appellant was allowed to have the exclusive use and occupation of two rooms, a sitting room and bed-room, situate in the main building of the workhouse, and during the whole of the qualifying period the appellant separately occupied the rooms as a dwelling by virtue of his employment as industrial trainer at the workhouse.

The guardians reserve another room in the main building of the workhouse, which they use as a board room.

The master of the workhouse (also appointed, paid, and employed by the guardians of the poor,) resided in other rooms situate in another part of the workhouse building.

By the Poor Law Orders it is the duty of the master of the workhouse to receive from the porter the keys of the workhouse

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at nine o'clock every night, and to deliver them to him again at six o'clock every morning, or at such hours as shall from time to time be fixed by the guardians.

The appellant could not stay out of his rooms after the hour of nine o'clock in the evening without the permission of the master of the workhouse. If the appellant did stay out without such permission, the master would have no power to suspend or dismiss him, but would report the matter to the guardians, who would deal with it either by reprimand or dismissal. Save in this respect the appellant was not subject to the orders or control of the master of the workhouse.

The barrister decided that the residence of the master of the workhouse (the official superior of the appellant) was in law the residence of his employers (the guardians of the poor), and the fact that the appellant had no right to stay out of his rooms after 9 P.M. without the permission of the master, and was liable to be reported if he did so, was an exercise of control sufficient in law to prevent his being an occupying tenant of a dwelling-house within the Representation of the People Act, 1884.

The barrister accordingly expunged the appellant's name from the occupiers' list of parliamentary voters.

J. A. Foote, for the appellant. The appellant had the separate use and occupation of two rooms in the workhouse by virtue of his employment by the guardians, and their occasional use of another room as a board-room did not make them inhabitants of the workhouse. Neither did the master inhabit the workhouse, but only part of it. In any case the appellant was not in the service of the master within 48 Vict. c. 3, s. 3 (1), but was only to some extent under his supervision.

The Hon. Bernard Coleridge, for the respondent. First, the appellant did not inhabit the workhouse, which is a distinct separate

(1) Representation of the People Act, 1884 (48 Vict. c. 3), s. 3: "Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act, and of the Representation of the People Acts, to be an inhabitant occupier of such dwelling-house as a tenant."

building and not divided into rooms like barracks. If he occupied the workhouse the master, who was his superior, did so also. In any view of the case, the guardians inhabited the building, and this deprives the appellant of his right to vote.

LORD COLERIDGE, C.J. From the beginning of this case I have been unable to see that the revising barrister was right. The appellant is industrial trainer in a workhouse, and claimed to vote as an inhabitant occupier of a dwelling by virtue of his employment within 48 Vict. c. 3, s. 3. It is now the law that a dwelling-house does not mean a part of the house structurally severed from the rest of it, but where any room is separately occupied by a person by virtue of his service or employment, he is an inhabitant occupier and entitled to vote unless the house is inhabited by any person whom he serves in his office or employment. It has been argued that the appellant serves under the master of the workhouse, and that the workhouse is inhabited by the master. In a certain very limited sense the master is the superior of the appellant, but in the event of any misconduct on the appellant's part the master cannot deal with the case, but must report it to the guardians. If the appellant stays out later in the evening than is permitted, the master can only report him. It would be straining the words of the section to hold that the appellant serves under the master. He serves under the guardians. It is also clear that the master does not reside in the workhouse, that is the whole workhouse, within the meaning of the section.

Then the barrister has found that the guardians are inhabitant occupiers of the workhouse. But I cannot think that they are. They only occupy such part of it as is required for a board-room, and the mere fact that they occasionally assemble for a few hours in this room does not make them occupiers of the whole building.

GROVE, J., and CAVE, J., concurred.

Judgment for the appellant.

Solicitor for appellant: *S. Hamilton, for J. W. Friend, Exeter.*
Solicitors for respondent: *J. E. Fox & Co., for H. & B. J. Ford.*

A. P. S.

1885 Oct. 31.

MAGARRILL, APPELLANT; THE OVERSEERS OF THE TOWNSHIPS OF WHITEHAVEN AND PRESTON QUARTER, WHITEHAVEN, RESPONDENTS.

Parliament—County Vote—Disqualification—Receipt of Parochial Relief or other Alms—2 Wm. 4, c. 45, s. 36—Employment by Taskmaster of the Guardians of the Poor—Stonebreaking.

The appellant having applied to the poor law guardians for work was employed by them by way of relief in breaking stones and paid out of the parochial funds, the amount paid to him being much greater than the value of his work to the guardians:—

Held, that he had received "parochial relief or other alms" within 2 Wm. 4, c. 45, s. 36 (1), so as to disqualify him from voting.

CASE stated by the revising barrister for Cumberland and Westmoreland.

The appellant, a married man with three children, applied to the relieving officer for Whitehaven for work. The relieving officer gave him a ticket directed to the taskmaster to the Whitehaven Guardians, requesting him to allow the appellant to break four bushels of stones per day, and told him to take the ticket to the taskmaster of the union, who set the appellant to stonebreaking. The appellant in the course of his employment brought back the ticket at the end of the day and obtained 1*s.* 3*d.*, which 1*s.* 3*d.* was paid by the relieving officer out of the funds forming part of the parochial funds for the relief of the poor. This employment continued for six weeks, during which time there was great distress in the district. The stones to be broken were collected by the appellant, and others in the same position, under the supervision of the taskmaster and brought to a yard in Whitehaven, hired especially by the guardians, and there broken. The guardians have advertised these broken stones for sale, and the only offer they have received is 1*s.* 6*d.* per ton, which was

(1) 2 Wm. 4, c. 45, s. 36: "No person shall be entitled to be registered in any year as a voter, &c., for any city or borough who shall within twelve calendar months next previous to the last day in July in such year, have received parochial relief or other alms which by the law of Parliament now disqualify from voting."

The foregoing enactment is extended to counties by the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 40.

not entertained. The guardians ask 5*s.* per ton, which would only recoup them for money spent in the operation. The guardians are bound by Out Door Relief Regulation Order, article 6, which prohibits the allowing relief to an able-bodied male pauper out of the workhouse unless he be set to work and kept at work by the guardians as long as he continues to receive relief. The guardians are paying rent for the yard. The Board act upon the principle that every payment made by them to paupers assumes the form of relief not of wages, and consequently must be measured by the wants of the applicant and not by the quantity of work done. In conformity with this principle the able-bodied pauper who has more than two children receives threepence per day more than others for each child above that number.

The barrister expunged the name of the appellant from the register on the ground of parochial relief.

Asquith, for the appellant. There is no distinct finding that the appellant's labour was not worth the amount paid to him by the guardians, having regard to the usual scale of wages in the district. A comparison of the payment with the usual run of wages was the test adopted in *Kemp's Case* (1) and *Taylor's Case*. (2)

No counsel appeared for the respondent.

LORD COLERIDGE, C.J. This was clearly a receipt of "parochial relief or other alms" within the Reform Act. The work done by the appellant was not, so far as the ratepayers were concerned, remunerative, and it is quite plain that it was intended to be and was received as parochial relief.

GROVE, J., and CAVE, J., concurred.

Judgment for the respondent.

Solicitors for appellant: *Helder & Roberts, for Edward Atter, Whitehaven.*

(1) P. & K. 128. (2) 1 P. R. & D. 156.

A. P. S.

1885
Nov. 2.

WELLS, Appellant; STANFORTH, Respondent.

Parliament—County Vote—Claims—Late Publication by Overseer—Registration Act, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 2, *Part* 2.

An overseer received claims in due time from occupiers and from lodgers not already on the register, but published a list of them some days after the time specified in the second Schedule, part 2, of the Registration Act, 1885:—

Held, that this did not invalidate the lists, and that the revising barrister was right in accepting and revising them.

Case stated by one of the revising barristers for the county of Middlesex.

The material facts were these:—

The overseers of the parish of Hornsey received a number of claims by occupiers and by lodgers not already on the register, in due and proper time, but did not sign or publish lists thereof respectively before the 25th day of August, 1885, but signed and published such lists two or three days after that date.

It was objected that the revising barrister had no power to accept or revise these lists on the ground, that they had not been signed or published by the overseers in accordance with paragraphs 43 and 45 of the precept in schedule 2, part 2, of the Registration Act, 1885.

Under paragraph 42 of this precept the overseers are, on or before the 25th of August, to make out lists containing the name of every person who has given, before the 20th of August, notice of his claim to be registered in any list of voters for the parish, in respect of a fifty pounds rental, ten pounds occupation, household, or lodger qualification, making separate lists of persons claiming to be registered in the occupiers' list, and persons claiming to be registered as lodgers, but not comprised in the old lodgers' list.

By paragraph 43, copies of these lists are to be signed and published before the 25th of August.

By paragraph 44 copies of such lists are to be open to inspection during the fourteen days after the 25th of August.

By paragraph 45 copies of such lists are to be delivered to the clerk of the peace on or before the 25th of August.

The revising barrister overruled the objection and revised the lists. The question for the Court was whether he was right in so doing.

Grantham, Q.C. (*Julian Robins*, with him), for the appellant, contended that compliance with the directions as to time in the precept was essential to the validity of the lists.

Sir Henry James, Q.C. (*Harry Greenwood*, with him), for the respondent, was not called on.

LORD COLERIDGE, C.J. The consequences of allowing this objection would be disastrous in the power which it would give to an overseer who chooses to run the risk of disfranchising persons who are entitled to the franchise, and have done all they could to secure it. Even if the Acts were silent on the subject, we should require very distinct words in the statutes to compel us to come to the conclusion, that it was the intention of the legislature to enact anything from which such a consequence should follow. But the matter has been foreseen and provided for by the Registration Act, 1843. By s. 38 the revising barrister is to insert in any list of voters for any city or borough the name of every person omitted, who shall be proved to the satisfaction of such barrister to have given due notice of his claim, and to have been entitled at the end of the qualifying period in respect of the qualification described in the notice of claim. That provision, by s. 30 of the Representation of the People Act, 1867, applies to counties, and the former Act, except as to parts expressly repealed, is still in force, and would in itself be an answer to this objection. But there is another answer, and that is that by s. 18 of the Registration Act, 1885, the forms in the schedule to the Act are substituted for those which had previously been used; but the section goes on in express terms to say: "A disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing." It is clear that the overseer's neglect to sign these lists in due time did not invalidate them, and the decision of the revising barrister was right.

GROVE and CAVE, JJ., concurred.

Judgment for the respondent.

Solicitors for appellant: *Dubois, Reid, & Williams.*

Solicitors for respondent: *Corbin & Greener.*

A. M.

1885
Nov. 2.

STRIBLING, APPELLANT; HALSE, RESPONDENT.

Parliament—Borough Vote—Tenure of House by Service—Separate Bedroom—Joint User of Sitting-room—Representation of the People Act, 1884 (48 *Vict. c.* 3), *s.* 3—*Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 2, *Part II., Form A.*

A shop assistant occupied exclusively, by virtue of his employment, a furnished bedroom in a dwelling-house belonging to his employers. The house contained other bedrooms similarly inhabited by other persons in the same employment, and a dining-room in which the inmates of the house took their meals in common, which were provided for them by their employers. The inmates had no keys of their bedrooms. The employers did not inhabit the house, but they had a resident caretaker who exercised general control over it, and a resident servant who was not under the order of the inmates, and by whom the domestic service requisite for the rooms was done:—

Held, that there was sufficient inhabitancy of a dwelling-house, by virtue of service, within s. 3 of the Representation of the People Act, 1884, to confer the franchise, and that this was not affected by the joint user of another part of the house.

CASE stated by the revising barrister for the borough of St. Pancras.

The appellant during the period of twelve months and upwards previous to the 15th of July, 1885, had been employed as a shop assistant, and in virtue of such employment had during the same period inhabited solely one furnished bedroom in a dwelling-house belonging to his employers, situate within the south division of the borough.

The house had not during any part of such period been inhabited by any person, under whom the appellant served in his employment, unless upon the facts herein appearing the Court holds that it had been in law inhabited by his employers.

The appellant's bedroom was not structurally severed from the rest of the house, nor separately rated. The appellant had no key of the room-door.

The house contained other bedrooms similarly inhabited by other persons in the same employment as the appellant, who with the appellant are hereinafter referred to as the "inmates." It also contained a sitting or dining-room in which the inmates took their meals in common, such being provided for them by their employers.

The employers had exercised throughout the said period general control over the whole of the house, such control being enforced through a resident caretaker.

The facts hereinafter mentioned are stated by way of illustration of the duties performed by the caretaker. At a certain hour every night he locked the street door, by which alone ingress and egress to and from the house were obtained, and took possession of the key. Before locking the door he required all visitors to leave the house. After locking the door he did not during the remainder of the night, except under special circumstances, open it or suffer it to be opened to allow any of the inmates to come in or go out. Shortly after locking the door he turned off the gas by which the rooms throughout the house were lighted, and saw that no lamp or other light was thereafter kept burning in any of the rooms.

The employers also performed, by a resident servant who was not under the orders of the inmates, the domestic service requisite for the bedrooms of the inmates and for the house generally.

Subject to the question whether the bedroom so inhabited by the appellant was or was not a dwelling-house for the purposes of the Representation of the People Acts, 1867 and 1884, he was in all respects qualified to be inserted in the list.

Twelve other persons whose names were set out in the schedule attached to the case claimed to be inserted in the list under similar circumstances.

It was contended on behalf of the appellant and the other persons that the several bedrooms inhabited by them respectively as aforesaid were dwelling-houses for the purposes of s. 3 of the Representation of the People Act, 1884, and that each of them was under that section entitled to be placed on the list as an inhabitant occupier of a dwelling-house as tenant.

The revising barrister decided that by reason of the control exercised and service performed by the employers as above stated, the bedrooms inhabited by the appellant and by the other persons were not separately occupied as dwelling-houses for the purposes of the Representation of the People Acts, 1867 and 1884, and he disallowed the claims accordingly.

The Representation of the People Act, 1884, s. 3, enacts:

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"Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant."

The Registration Act, 1885, s. 18, enacts that the forms and instructions contained in the second and third schedules to the Act are to be used and observed in all cases to which they apply, in substitution for the forms, instructions, and directions hitherto in use. Schedule 2, part 2, contains forms for occupation voters, and among others form (A) of requisition by overseers requiring names of inhabitant occupiers, and instructions for filling up a form. Among these occur the following, under the heading "Instructions in case of what is commonly called the Service Franchise," "The dwelling-house in the second column (of the form of return given) may be either—(*a*) a separate house—for example, a schoolmaster's house; or (*b*) a part of a dwelling-house separately occupied as a dwelling—for example, a room or rooms over a stable, or caretaker's rooms in an office," and also, "In filling up the return it must be recollected that, under the Representation of the People Acts,—(*a*) In the case of a man who inhabits by reason of any office, service, or employment, if the same house is inhabited by any person under whom such man serves in his office, service, or employment, such man is not considered a separate inhabitant occupier; for example, a butler occupying rooms in his master's house is not such an occupier, although, if he occupied rooms over a detached building, such as a laundry, he might be such an occupier; (*b*) the head of the family alone is considered to be the occupier."

Beddall, for the appellant. The findings in the case cover every requirement of the 3rd section of the Representation of the People Act, 1884, so far as the claimant himself is concerned, and the illustration given in the instructions shews the manner in which the master must inhabit to destroy the servant's right to the franchise. There is no such inhabitancy by the master in this case as is contemplated by the statute.

R. M. Bray, for the respondent. What the Act requires, is something more than merely sleeping in the same place for a twelvemonth. There must be exclusive occupation of a dwelling-house, and admitting that for some purposes this room is a dwelling-house, yet if there is no agreement that the appellant shall have the separate use of the dwelling-house, he is not within the section. It is not necessary he should be a tenant, because that is to be implied, but it is necessary that he should be actually entitled to the separate use of a dwelling-house as a dwelling-house. The Act creates no new definition of what is a dwelling-house; on the contrary, by s. 11 expressions used in the Act are to have the same meaning as in previous Acts. The intention of the legislature is indicated by the use of the word 'tenure' in the marginal note to this section. There are, therefore, two objections to this claim: the absence of any agreement for the exclusive use of this room, and the difficulty similar to that pointed out by Brett, L.J., in *Bradley* v. *Baylis* (1), that the occupation of this room as a bed-room, and the joint user of the sitting-room, cannot be separated, both being granted by the master concurrently, so that it cannot be said this bedroom is separately occupied as a dwelling.

LORD COLERIDGE, C.J. I am of opinion that the revising barrister was wrong. In this case we have to deal with three things, s. 3 of the Representation of the People Act, 1884, s. 18 of the Registration Act, 1885, and the forms and instructions in the second schedule to this Act which are made part of it. The instructions must be taken as expounding the intention of the legislature in the former Act, and if they are so taken, the words of s. 3 are plain. Where a man inhabits a dwelling-house, and that expression includes a room, by virtue of any office, service, or employment, and that includes occupation by a servant, he shall be deemed to be an inhabitant occupier of such dwelling-house as a tenant. There is, however, another term, and that is, that the dwelling-house is not occupied by any person under whom such man serves in such office, service, or employment.

(1) 8 Q. B. D. at p. 233.

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Now I agree that the expression "dwelling-house" used in this context must mean something more than the dwelling-house which is to be inhabited by the tenant, because otherwise an absurdity would follow that the master and the servant were both inhabiting the same room. I read it then that the occupier of a dwelling-house by virtue of service is to have the franchise where the house of which such dwelling-house forms part is not inhabited by the master. In this case are the conditions of the statute fulfilled? It is found in the case that these claimants have separate rooms in a house, separate from the house of business, and under the control of a caretaker. In this house there is a common room for the inmates, but each assistant has a separate room so long as he is in the employ of the firm. On this state of facts the only question that arises is, whether this dwelling-house, which consists of the aggregate of the separate bedrooms and the common room, was inhabited by any one under whom the inmates served. This is answered by the case, for it is plain that the master does not even go there, and can in no sense be said to inhabit there. Prior to the enactment of s. 3 of the Representation of the People Act, 1884, the occupation would have been that of the master, and the inmates would not have had any right to the franchise, because they would not have occupied either as owners or tenants. But that section has in plain terms given them that right, provided, as is the fact here, that the conditions contained in the section exist. It has been pointed out that in *Bradley* v. *Baylis* (1) the present Master of the Rolls expressed a doubt whether a person could be said to separately occupy a bedroom as a dwelling-house, when he dwelt partly in the bedroom and partly in a sitting-room and did not dwell in one exclusively. In deference to the doubt so expressed, we allowed a case to go to appeal, and that doubt was removed. (2) I think, therefore, we have no authority prior to the Act of 1884 which is binding upon us; and indeed it is very doubtful if any prior decision can assist in the construction of that Act, of which the

(1) 8 Q. B. D. 195.

(2) There is no reported case to this effect. *Anketill* v. *Baylis*, 10 Q. B. D. 577, which arose out of *Bradley* v. *Baylis*, turned on a different point.

meaning must be ascertained from the Act itself, and from the illustrations that are given in the instructions. In my opinion our judgment must be for the appellant.

GROVE, J. I have come to the same conclusion. I have considerable doubt on one question raised for the respondent, whether a man who has exclusive use of one room and the joint use of another can strictly be said to dwell in the former as a separate dwelling-house. As the similar doubt expressed by the Master of the Rolls has been overruled, it would appear that occupancy for a part of the twenty-four hours may be treated as sufficient. Further, the illustration given in the instructions is the case of a butler, who has a room over a laundry which he can only occupy for a portion of the twenty-four hours, and in which he could not remain all day consistently with his duty to his employer. That is to some extent an answer to my doubt, even if it had not been overruled, and I concur with the rest of the Court in giving judgment for the appellant.

CAVE, J. The first question is, whether the claimant inhabits a dwelling-house by reason of his service. He does in fact inhabit a room, and that may be in law the inhabitancy of a dwelling-house. Now this room is occupied, that is, used by the claimant separately, and no one else sleeps in the room. It is not occupied for any other purpose than a dwelling-house. Further, it is clear on the statement of facts, that the claimant had the sole and exclusive use of the room, and that is not affected by his use of some other room jointly with others. Further, it is impossible to say that the master inhabits a house into which he never goes. There is, therefore, no inhabitancy by the person under whom the claimant serves to take away his right to the franchise, and since all the conditions required by the section exist, the appellant is entitled to our judgment.

Judgment for the appellant.
Leave to appeal refused.

Solicitors for appellant: *Lumley & Lumley.*
Solicitors for respondent: *Halse, Trustram, & Co.*

A. M.

1885
Nov. 3.

DAKING, Appellant; FRASER, Respondent.

Parliament—Borough Vote—Declaration as to Misdescription—Reception of as Evidence—Time for sending—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 24—*Redistribution of Seats Act*, 1885 (48 & 49 *Vict. c.* 23), *s.* 30 (*a*).

A declaration by a person entered on a list of voters as to a misdescription in such list cannot be received as evidence by a revising barrister, unless it has been sent within the statutory time to the town clerk or clerk of the peace.

Case stated by the revising barrister for the borough of Ipswich.

The following are the material facts:—

The respondent, whose name appeared in the overseer's list, was objected to by the appellant. The revising barrister held the objection to be well founded, but a declaration under the Parliamentary and Municipal Registration Act, 1878, s. 24, for correcting a misdescription was handed to him by the town clerk, correcting the qualification of the respondent. The declaration purported to have been made before a justice of the peace on the 7th of September, 1885, and the indorsement thereon by the town clerk was that it was received by him at noon on that day.

By s. 24 of the Parliamentary and Municipal Registration Act, 1878, "Any person who is entered on any list of voters for a parliamentary borough or any burgess list, subject to revision under this Act, for a municipal borough, and whose name or place of abode or the nature of whose qualification or the name or situation of whose qualifying property is not correctly stated in such list, or in respect of whom there is any other error or omission in the said list, may, whether he has received a notice of objection or not, if he thinks fit, make and subscribe a declaration in the form in that behalf in the schedule to this Act, or as near thereto as circumstances will admit, before any justice of the peace, or any commissioner, or other person authorized to administer oaths in the Supreme Court of Judicature. (1)

"The declaration shall be duly dated, and shall on or before

(1) See now the Registration Act, 1885 (48 Vict. c. 15), Sched. 3, Form M.

the 12th day of September be sent to the town clerk, who forthwith shall indorse on the declaration a memorandum signed or initialed by him, stating the date when he received it, and naming the declarant, and the list to which the declaration refers, and shall deliver all such declarations to the revising barrister at his first court.

"If the declaration is sent as aforesaid in due time (of which the said indorsement shall be primâ facie proof), the revising barrister shall receive the declaration as evidence of the facts declared to, and that without proof of the signature of the declarant, or of the justice, commissioner, or person before whom the declaration purports to have been subscribed, unless he has good reason to doubt the genuineness of any signature thereto . . . ." (1)

By the Redistribution of Seats Act, 1885, s. 30 (*a*), the date for delivery of such declarations in the year 1885 was to be the 5th of September.

It was contended before the revising barrister that this declaration not having been sent in due time could not be received; but as it had been sent to the town clerk in time for the court, the revising barrister decided to accept it, and retained the name of the respondent in the list with the corrected qualification set out in the declaration.

Poyser, for the appellant. The statute is explicit that the revising barrister shall receive the declaration as evidence of the facts referred to "if the declaration is sent as aforesaid in due time." The date for the current year was the 5th of September, and as the declaration was not sent by that time it could not be received, and could be no answer to a valid objection.

The respondent did not appear.

LORD COLERIDGE, C.J. It appears to me to be clear that this decision was wrong, and must be reversed. There is a positive enactment that the declarations are to be sent to the town clerk by a certain day, and that if so sent they shall be received as evidence of the facts declared to. It is otherwise, if the Act is not complied with. The words of the statute are clear and beyond

(1) Applicable by the Registration Act, 1885, s. 1, sub-ss. 1 and 3, to occupiers in parliamentary counties.

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doubt, and to accept this declaration was to overrule them. There must be judgment for the appellant.

GROVE and CAVE, JJ., concurred.

Judgment for the appellant.

Solicitors: *Cobbold & Woolley, for Cobbold, Sons, & Rouse, Ipswich.*

A. M.

Nov. 5.

ATKINSON, APPELLANT; COLLARD, RESPONDENT.
FORD, APPELLANT; BARNES, RESPONDENT.
SEDGWICK, APPELLANT; NEVILLE, RESPONDENT.
FORD, APPELLANT; ELMSLEY, RESPONDENT.
LOWRY, APPELLANT; COLLARD, RESPONDENT.

Parliament—Borough Vote—Occupation Franchise—Inhabitancy of Dwelling-house by virtue of Service—Soldier occupying Quarters—Absence on Duty during Part of Qualifying Period—Representation of the People Act, 1884 (48 *Vict. c.* 3), *s.* 3.

A non-commissioned officer in the service of the Crown claimed the parliamentary franchise as the inhabitant occupier of a dwelling-house in respect of rooms occupied by him as his quarters in barracks.

He had inhabited the rooms, which consisted of a bedroom and sitting-room, during the qualifying period, subject, however, to certain regulations and powers of superior officers incident to military service, such, for instance, as the power of entry by the commanding officer at any time, and by other superior officers for the purpose of preserving order, and by certain officers at stated times for the purpose of inspection of the rooms, the power of the commanding officer to forbid any person to enter or leave the barracks at any time, and the obligation to be in his quarters at a stated hour every evening. The Crown supplied certain necessary articles of furniture for the rooms, the rest of the furniture being the claimant's own. The rooms formed part of one of the blocks of buildings situate within the barrack inclosure, the remaining rooms in the block being occupied by other non-commissioned officers, some of whom were superior in rank to the claimant, and the senior of whom was bound to preserve order in the block, and would be entitled to enter the claimant's rooms for that purpose. The colonel commanding lived in a house situate within the walls of the barracks:—

Held, that the claimant was entitled to the franchise under the 3rd section of the Representation of the People Act, 1884, on the ground that he had inhabited a dwelling-house within the meaning of that section, and that no person under whom he served had inhabited such dwelling-house.

In two other cases where votes were claimed by persons in military service,

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the facts with regard to the occupation of the quarters were similar, with the exception that the claimants, non-commissioned officers, had been absent for twenty-one days during the qualifying period from their quarters on duty elsewhere, and could not return without leave, but during such absence, in one case the claimant's wife and family, and in the other his furniture, remained in the quarters which were retained for him :—

Held, that, it not sufficiently appearing in those cases that there had been any constructive inhabitancy of the rooms by the claimants during the twenty-one days when they were in fact absent, they were not qualified under the above-mentioned section.

THESE cases and a number of others involving similar points were argued together.

In the case of *Atkinson* v. *Collard* notice of objection had been duly given to the name of the appellant Atkinson being retained on the list of occupation voters for the parish of St. Mary, Northgate, in the parliamentary borough of the city of Canterbury, on which list he appeared as occupier of part of a house, on the ground that he had not occupied the premises in respect of which he appeared on the list a sufficient time, and that his occupation was not as owner or tenant.

The facts, as stated by the revising barrister, with regard to his occupation were, in substance, as follows :—

The appellant was a sergeant in the 7th Dragoon Guards, the depôt of which was attached to the cavalry depôt at Canterbury, such cavalry depôt consisting of the depôt troop of every cavalry regiment in India.

As such sergeant he inhabited, by virtue of his service in the army, two rooms on the first floor in a block of buildings in the cavalry barracks, and had inhabited the same two rooms for more than twelve calendar months immediately preceding the 15th of July, 1885. The said rooms were used by him as a bedroom and sitting-room respectively. Of the furniture the Government supplied bed, table, two chairs, fender, and fire irons. A board with a list of those articles (which the appellant was not allowed to remove,) was hung up in the appellant's sitting-room. All other furniture the appellant supplied himself.

The appellant's rooms opened into a passage used in common by himself and other non-commissioned officers, the passage communicating with a staircase, and that again with a passage

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on the ground floor which led to the front door. No one had a key of the rooms but the appellant.

The appellant was obliged to be in his quarters by a stated hour every evening.

In accordance with the Queen's Regulations and certain standing orders issued by the commanding officer, it was the duty of the medical officer to inspect the appellant's quarters as well as all other portions of the barracks every week, and report as to the condition thereof. It was also the duty of the orderly officer, the troop officer, the quartermaster, and orderly troop sergeant-major to visit such quarters at stated times, and to report as to the order and condition in which the same were found, and such inspection did in fact take place, for which purpose the appellant, on receiving notice, was bound to admit the above-mentioned persons to his quarters, and they would have power, if refused, to break open the doors and enter.

There were non-commissioned officers of superior rank to the appellant who lived in the same block. It was the duty of the senior non-commissioned officer for the time being in each block in case of need to maintain order.

In case the appellant should be disorderly or make himself a nuisance, it would be the duty of such senior non-commissioned officer for the time being to enter the appellant's room to enforce order.

The colonel commanding the whole of the depôt lived in a detached house away from the block in which the appellant lived. The colonel's house was within the wall extending round the various barracks and barrack yards. The commanding officer could at any moment enter any part of the barracks, including the appellant's rooms, for any cause which might seem to him reasonable, though it was usual for him to give notice before making a general inspection, and he further had the power of closing the barrack gates and forbidding any person to enter or leave the barracks at any time.

The appellant was liable at any time to be ordered by the commanding officer to change from the quarters assigned to him and to live in others, and he would be bound to obey such orders.

The names of twenty-eight other persons mentioned in the schedule to the case were objected to under similar circumstances.

The revising barrister held that the occupation by the appellant and such other persons of their several quarters had not been of such a separate and exclusive nature, as to constitute him or any of them a person deemed to be an inhabitant occupier of a dwelling-house as tenant within the true intent and meaning of s. 3 of the Representation of the People Act, 1884.

He further held that, if his decision was wrong as to this point, the dwelling-house in the proviso or second part of the said section must be taken to mean either the barracks as a whole or the block of buildings in which the appellant's quarters were situated, and that in either of such views the dwelling-house in such extended sense was inhabited by a person or persons under whom the appellant served. He therefore expunged the name of the appellant and such other persons from the list.

In the case of *Ford* v. *Barnes* the facts were as follows:—

The respondent, whose name appeared in the list of occupation voters for the city of Exeter in respect of the occupation of a dwelling-house, was duly objected to by the appellant. The respondent was a battery sergeant-major in the Royal Artillery, stationed at Topsham barracks, Exeter. He was an unmarried man, but being a staff-sergeant he had the right to the exclusive use and occupation of one large room in the block of buildings known as the staff-sergeants' quarters in Topsham Barracks, and the revising barrister found that during the qualifying period he himself separately occupied the said room as a dwelling by virtue of his office as a sergeant-major in Her Majesty's army. The furniture in his quarters belonged to himself with the exception of the fire-irons, bedstead, and table. The facts with regard to the character of his occupation were substantially similar to those in the preceding case. The respondent was absent on duty at Okehampton for twenty-one days during the qualifying period and could not return without leave, but during his absence he retained his room and kept his furniture in it, and no other person used or occupied the said room.

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The revising barrister retained the voter's name on the list.

In the case of *Sedgwick* v. *Neville* the facts with regard to the occupation of the voter objected to, a sergeant instructor in musketry in a regiment, were substantially similar to those of *Atkinson* v. *Collard*. It was stated in the case that the gates of the barrack inclosure in which the voter's quarters were situated were closed and locked at tattoo, or ten o'clock at night, and opened at an early hour in the morning, and that within this period none of the inmates were allowed to pass through the said gates without permission of their commanding officer, but at other times they could do so.

The revising barrister retained the voter's name on the list.

In the case of *Ford* v. *Elmsley* the facts with regard to the occupation of the respondent, a non-commissioned officer occupying quarters at Topsham Barracks, were similar to those of *Ford* v. *Barnes*, with the exception that while the respondent was at Okehampton his wife and children had the right to remain and remained in and occupied his quarters during his absence.

The revising barrister retained the voter's name on the list.

In the case of *Lowry* v. *Collard* the appellant, whose name the revising barrister had erased from the list of occupation voters for the parish of St. Mary, Northgate, in the parliamentary borough of the city of Canterbury, was a captain in the King's Dragoon Guards, commanding the troop of his regiment attached to the cavalry depôt at Canterbury (such cavalry depôt consisting of the depôt troop of every cavalry regiment in India). He had occupied a room in a block of buildings called the officers' quarters in the cavalry barracks during the qualifying period, and the revising barrister found that he occupied it under such circumstances that he had inhabited a dwelling-house by virtue of his service in the army. The block consisted of various rooms occupied as officers' quarters, such rooms all opening into a common corridor, which communicated by a common staircase with an outer entrance door. It was the duty of the senior officer for the time being in each block of quarters in case of need to maintain order throughout such block. During the qualifying

period a major occupied similar quarters in the same block of buildings in which the appellant's quarters were situated, and was the senior officer occupying quarters in such block. The colonel commanding the garrison lived in a detached house away from the block in which the appellant lived, but within the wall which extended round the various barracks and barrack yards, the whole of which were under his orders and control. The colonel could at any time close the barrack gates or refuse admittance to any person, and had the right at any time if he deemed it necessary to enter any part of the barracks under his command, though, as a fact, this right was never exercised with regard to officers' quarters.

The revising barrister erased the appellant's name from the list, on the ground, first, that the barracks as a whole must be taken to be the dwelling-house within the proviso or second part of the 3rd section of the Representation of the People Act, 1884, and must be taken to be inhabited by a person under whom the appellant served, viz., the colonel commanding the cavalry depôt; or, secondly, if the particular block of buildings in which the appellant's quarters were situated was to be taken to be the dwelling-house in the said proviso mentioned, then the said block was inhabited by a person under whom the appellant served, viz., the major.

Crump, Q.C. (*H. Bargrave Deane*, with him), for the appellant in *Atkinson* v. *Collard*. The appellant was entitled to be registered as an occupation voter under the 3rd section of the Representation of the People Act, 1884 (48 Vict. c. 3). That section provides that where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant. First, the appellant in this case clearly inhabited the rooms which were his quarters, and those rooms clearly were a dwelling-house within the definition in s. 5 of the Parliamentary

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and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26). The fact that the appellant was, as inhabitant of the rooms, subject to certain regulations and restrictions incident to his service did not make him the less the inhabitant of the rooms. The appellant inhabited them by virtue of his service or employment. Secondly, no person under whom he served inhabited them. With regard to the first point, even assuming that in consequence of the restrictions upon his use of the rooms he could not in one sense be said to occupy them, the section says that if he inhabits he shall be deemed to be an inhabitant occupier. The instructions contained in the schedule to the Registration Act, 1885 (48 Vict. c. 15), Schedule II., General Forms, Part II., Form A., and Schedule III., General Forms, Form A., shew clearly the intention of the legislature, because they give as instances where there would be a qualification the cases of a coachman occupying rooms over stables and a butler occupying rooms over a detached building, such as a laundry. Surely in those cases the master could make such restrictions as he pleased with regard to the use of the rooms: he could enter them whenever he pleased without being guilty of a trespass, and could turn the servant out at any moment without notice. The master in those cases would have as much control over the rooms as the Crown could exercise in this case. With regard to the second point, the revising barrister was wrong in holding that a person under whom the appellant served inhabited the dwelling-house. The superior officer is not a person under whom the appellant serves within the meaning of the section. They both served under the Crown. The person intended by the section is the master or employer. It is not intended that where a servant inhabits separate rooms, the fact that another superior servant occupies different rooms in the same block of buildings should destroy the qualification. The case is not analogous to that contemplated by the Act, viz., of a room occupied by a servant, which would constitute a dwelling-house within the Act, but for the fact that it forms part of the dwelling-house which the master inhabits. The block of buildings, within which the appellant's quarters were, was not a dwelling-house in that sense. The superior officer could not be said to

inhabit the whole block. There was no other person who could be said to inhabit the appellant's rooms but the appellant. So similarly, the barracks did not constitute a dwelling-house, and the colonel could not be said to inhabit the appellant's rooms.

Asquith, for the respondent. The object of the 3rd section of the Representation of the People Act, 1884, was not so much to create a new franchise as to remove a technicality, which excluded from the householder's franchise persons who were in every substantial respect householders. The object was to extend the inhabitant occupier's qualification so as to include the class of persons who were deprived of the franchise on a technical ground, viz., that in contemplation of law they did not occupy their dwelling-houses as tenants but as servants. It was intended to meet cases where, but for the mere fact of his service, a man occupies in all respects as an inhabitant occupier of a dwelling-house in the sense required by the Representation of the People Act, 1867. A man cannot inhabit in this sense unless he occupies. In this case the appellant did not occupy his rooms as a separate dwelling in any reasonable sense of the terms as applied to the franchise. He could not be said to be a householder in any sense of the term. He was subject at any moment to the orders of his commanding officer with regard to his use of the room. By the terms of 41 & 42 Vict. c. 26, s. 5, there must be a sole and exclusive use of part of a house separately occupied as a dwelling. These rooms were not separately occupied as a dwelling by the appellant. They formed part of a building belonging to the Crown used for military purposes, and the appellant inhabited them, not as a separate occupier of a dwelling-house, but merely in the course of his duty as a soldier in barracks.

[LORD COLERIDGE, C.J. Would not precisely the same line of reasoning apply to the coachman living over the stables? Why is not this appellant as much a sole and exclusive occupier as such a servant?]

Here the rooms were not structurally severed as in the case supposed. It is submitted that in that case whilst the service lasted the master could not enter the rooms, or at any rate, could only enter the rooms on reasonable grounds. He could not enter without notice at an unreasonable hour.

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[LORD COLERIDGE, C.J. Surely he could enter his own rooms in the occupation of his servant as such at any time.]

Secondly, the revising barrister was right in holding that the dwelling-house was inhabited by a person under whom the appellant served. The meaning of the words "under whom he serves," is not limited to the master or employer, but includes any superior officer.

Bompas, Q.C. (*The Hon. Bernard Coleridge* with him), for the appellant in *Ford* v. *Barnes*. It is contended that s. 3 of the Representation of the People Act, 1884, can only apply to cases where the servant occupies a separate house, structurally severed and distinct; otherwise the greatest difficulty arises as to the construction of the words "and the dwelling-house is not inhabited by any person under whom such man serves." These words must be construed, according to the ordinary rules of construction, as referring to the same dwelling-house as the man inhabits. If that dwelling-house could be merely a room in a house, then the master, in order that those words should apply, must inhabit the same room as the servant, which would be an absurdity.

It is submitted that this consideration shews that the case contemplated is where the servant inhabits a house separate from that of the master, or at any rate as sole occupier, not where he inhabits roms in premises in his master's control and occupation. A room inhabited by a soldier in barracks, which are in the control and occupation of the Crown, is not a house for the purpose of the franchise.

Secondly, the voter was absent from his quarters for twenty-one days at Okehampton. There could be no constructive residence by him during that period, because he could not return without leave: *Ford* v. *Hart*. (1)

Foote, for the respondent. The case of *Ford* v. *Hart* (1) related to residence under the Reform Act (2 Wm. 4, s. 45), ss. 27, 32. The question here is whether the voter was an inhabitant during the whole of the qualifying period. It is submitted that there is a distinction for this purpose between "inhabitancy" and "residence:" *R.* v. *Mitchell* (2); *Ford* v. *Pye* (3); *Durant*

(1) Law Rep. 9 C. P. 273. (2) 10 East, 511. (3) Law Rep. 9 C. P. 269.

v. *Carter* (1); *Powell* v. *Guest* (2). A man may be said to continue an inhabitant of a place, although he is not physically there. Mere temporary absence does not necessarily constitute a break of inhabitancy, if there is an intention of returning and a right to return to the premises inhabited. Here the voter still had his furniture in his rooms, which were retained for him, and he might have obtained leave to return at any time. The revising barrister has found as a fact that the voter did inhabit the rooms during the qualifying period.

The Hon. Mark Napier, for the appellant in *Sedgwick* v. *Neville*. The case contemplated by the 3rd section is a case, where the master or employer can inhabit the dwelling-house. The Crown can occupy, but cannot inhabit.

[CAVE, J. That argument would exclude all servants of a corporation.]

Soldiers do not inhabit their quarters as servants by virtue of their service or employment in the sense intended by the section. The claimant here cannot be said to have had that sole and exclusive occupation, which is necessary to constitute his rooms a dwelling-house. Can a man be said to occupy rooms as a dwelling-house in any reasonable sense of the term when the gates of the building in which his rooms are situated are locked at night by the authorities, and if within he cannot get out, and if outside he cannot get in, and where his superior officer may enter at any moment?

It is well settled law that the Crown is not affected by any statute except when expressly mentioned. The Crown would be affected if the effect of the section is to enfranchise soldiers in the service of the Crown by reason of their occupation of Crown property. The Queen's Regulations forbid soldiers to take part in political demonstrations and discussions, because it is considered undesirable that soldiers should be involved as partisans in political struggles. On the same principle it is contrary to public policy that soldiers should have votes.

Rosher, for the respondent. The rule of construction is, that the Crown is not affected unless mentioned if its rights or

(1) Law Rep. 9 C. P. 261. (2) 18 C. B. (N.S.) 72; 34 L. J. (C.P.) 69.

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property would be prejudicially affected. How does the enfranchisement of soldiers prejudicially affect the rights of the Crown? The 10 & 11 Vict. c. 21, s. 2, shews clearly that soldiers may be entitled to a vote, for it provides that they shall be confined to barracks during elections, except for the purpose of mounting or relieving guard and giving their votes at such election. According to the appellant's contention it is impossible that they should be so entitled, because the Crown is not expressly mentioned in any of the former statutes relating to the franchise. The Crown is expressly mentioned in the Representation of the People Act, 1884, and Registration Act, 1885: see 48 Vict. c. 3, s. 9, sub-s. 9, 48 Vict. c. 15, Sched. II., Form I., part 2, clauses 23 & 24.

The voter here does inhabit his rooms by virtue of his service under the Crown within the meaning of s. 3. The Queen's Regulations as to soldiers not taking part in political discussions or demonstrations have no application to the question whether they are entitled to a vote.

Bompas, Q.C. (*The Hon. Bernard Coleridge*, with him), for the appellant in *Ford* v. *Elmsley*. In this case the same considerations are involved as in the case of *Ford* v. *Barnes*, except that the voter's wife and family remained in his quarters while he was absent at Okehampton. The 3rd section expressly says "where a man *himself* inhabits." It is submitted that the fact of the wife's continuing to occupy can make no difference between the two cases. He must himself inhabit to be within the section.

Sir J. E. Gorst, S.G. (*Foote* with him), for the respondent. It is submitted that inhabitancy is a question rather of fact and degree than of law, and the revising barrister, so far as he is concerned, has found as a fact that the respondent did occupy during the qualifying period: *Reg* v. *Mayor of Exeter* (1). The respondent's rooms were in fact occupied by his wife and family during his absence, and it is only true that he could not return from Okehampton in the sense that he would have been subject to military penalties for so doing. A sheriff in attendance on judges at assizes cannot go back to his home while in such attendance, in the sense that he would be fined for so doing, but

(1) Law Rep. 4 Q. B. 110.

in any other sense he has the power to go back, and he cannot surely be said to cease to inhabit his dwelling during such period.

[CAVE, J. The soldier would be turned out of his house probably if he returned contrary to orders. How can a man be said to inhabit by virtue of his service when his service binds him to be elsewhere? The contention that he inhabits by his wife seems to give no effect to the word "himself."]

Crump, Q.C. (*H. Bargrave Deane* with him), for the appellant in *Lowry* v. *Collard*.

Asquith, for the respondent.

Cur. adv. vult.

Nov. 5. The judgment of the Court (Lord Coleridge, C.J., Grove, and Cave, JJ.) was delivered in the above-mentioned cases by

CAVE, J. The appellant in the case of *Atkinson* v. *Collard* is a sergeant in the army, and he claims the vote as having inhabited a dwelling-house by virtue of his service within the meaning of the 3rd section of the Representation of the People Act, 1884.

It was objected that this section does not apply to service in the army, because the Crown is not bound by a statute unless named in it. How the rights, prerogatives, or property of the Crown are affected by soldiers having votes we cannot see, but it is enough to say that the Crown is named in the statute, as we shall shew presently.

Next it was said that it was contrary to public policy that soldiers should have votes. No authority was cited for this proposition; on the contrary, soldiers have always, in respect to the franchise, been treated on the same footing as civilians. By 8 Geo. 2, c. 30, which provides for the removal of soldiers from the vicinity of an election, it is enacted that nothing in the Act contained shall extend to any officer or soldier who shall have a right to vote at any such election but that every such officer and soldier may freely and without interruption attend and give his vote at such election. A similar provision is to be found in 10 Vict. c. 21. It is true that by 22 Geo. 3, c. 41, and 8 Geo. 4, c. 53, s. 9, officers of excise and customs and persons engaged in

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the Post Office were disqualified from voting, but these disqualifications were finally removed by 31 & 32 Vict. c. 73, which recites that it is inexpedient that any person otherwise entitled to be registered as a voter should be incapacitated to vote at the election of a member or members to serve in Parliament by reason of his being employed in the collection or management of Her Majesty's revenues.

The question, moreover, is put beyond all doubt by the 9th section of the Representation of the People Act of 1884, which provides that where a man inhabits a dwelling-house in respect of which no person is rated by reason of such dwelling-house belonging to or being occupied on behalf of the Crown, or by reason of any other ground of exemption, such person shall not be disentitled to be registered as a voter, &c. Now a dwelling-house can only be occupied on behalf of the Crown by a servant of the Crown, or, at any rate, by some one who is regarded as being in consimili casu with a servant of the Crown, so that this provision is a clear indication that servants of the Crown are intended to be included within the Act.

The other objections made against the vote were of a more special character. The word "inhabit" simply means to dwell in, and there can be no doubt that the appellant inhabits the two rooms in question. It admits of as little doubt that they form a dwelling-house.

By s. 5 of the Registration Act of 1878 the term "dwelling-house" is to include any part of a house where that part is separately occupied as a dwelling, and it is also provided that where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part. Now the two rooms in question are either themselves a dwelling-house or they are part of a dwelling-house, and in the latter case, as they are separately occupied as a dwelling, they form a dwelling-house within that section. A servant does not the less inhabit a dwelling-house, nor is it the less a dwelling-house, because the master makes and enforces regulations for the good government of the servant and of his house, nor does the fact that the master retains himself

or delegates to others the power of entering a servant's house for the purpose of maintaining order prevent the servant from having the sole and exclusive use of the house.

The next objection is that the dwelling-house was inhabited by a person under whom the appellant served. Now it is obvious that this part of the section cannot apply where the master and servant occupy separate and distinct houses; and, as where the servant inhabits part of a house he must have the sole and exclusive use of that part, this clause can only apply where the servant inhabits part of a house and the master inhabits the house of a part of which the servant has the sole and exclusive use. Thus, where a butler has the sole and exclusive use of a bed-room in his master's house, it is clear that the dwelling-house is inhabited by the person under whom the butler serves; and where a gatekeeper has the sole and exclusive use of a cottage at the gate of his master's park, it is equally clear that the dwelling-house is not inhabited by the person under whom he serves. In the present case the appellant inhabits two rooms in a block of buildings, and there are other rooms in the same block inhabited by other non-commissioned officers, some of them of superior rank to himself. Now, it appears impossible to contend that the appellant inhabits the whole block as a dwelling-house, and, if he inhabits his own two rooms only, it must follow that the other non-commissioned officers do the same, and consequently that the officer of highest rank also only inhabits his own rooms.

If this is not so, either every person in the block must inhabit the whole block, which is absurd, or else, when the officer of highest rank goes away, the next officer immediately and by virtue of his superior rank at once begins to inhabit the whole block, having previously inhabited only his own two rooms. In truth the senior non-commissioned officer occupies his own two rooms and those only, and cannot inhabit rooms which he does not in fact occupy either by himself or his servants, although undoubtedly the converse does not hold, and a man may occupy what he does not inhabit. In our judgment there is no dwelling-house here of which the appellant occupies a part and the senior non-commissioned officer the whole.

Moreover we think that the appellant in this case does not

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serve under the senior non-commissioned officer. It is not necessary to decide whether a private soldier serves under the captain of his troop or company or a captain under the colonel of his regiment. A soldier does not serve under everyone of superior rank to himself in the same regiment, and there are no facts stated in the case which warrant the conclusion that the appellant served under anybody who inhabited any rooms in the same block of buildings.

These considerations dispose of most of the cases relating to non-commissioned officers and married men.

In the case of *Lowry* v. *Collard* it was contended that the appellant in that case, a captain, could not have the vote because an officer of superior rank, a major, had quarters in the same block of buildings. This case, however, is not substantially different from that of *Atkinson* v. *Collard*, and we think the same considerations apply. The major did not in fact or constructively inhabit the whole block but only his own quarters, and moreover is not a person under whom Captain Lowry served in his office or employment.

In the case of *Ford* v. *Barnes*, the respondent, who claims the vote in respect of his inhabitancy of a dwelling-house in the barracks of Exeter, was absent during three weeks of the qualifying period at Okehampton. During this period he could not return to Exeter without leave.

The respondent did not therefore in fact inhabit at Exeter during the whole of the 365 days making up the qualifying period. We think, however, that actual inhabitancy during every one of the days is not necessary, and that it is sufficient if the claimant can make out a constructive inhabitancy. But in order to make out a constructive inhabitancy there must be an intention of returning after a temporary absence, and a power of returning at any time without breach of any legal obligation.

The case of a sheriff was put in the course of argument. A sheriff always intends to return when his duties are at an end, and has always power to return without breach of any legal obligation. If his home is sufficiently near to the assize town, he does in fact return to it every evening. If it is too far, he does not return to it, not because he breaks any legal obligation by

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going to his home, but because he cannot get back in time for his official duties. His difficulty is a physical and not a legal one, and he cannot go home every evening for the same reason that a man who is travelling on the Continent cannot do so.

In this case, unfortunately, the facts are very briefly stated, and we do not know whether, when the claimant was sent to Okehampton, it was the intention of those who sent him that he should return to Exeter; or whether leave to return during the twenty-one days could have been procured, and if not why it would have been refused. If it could have been shewn that it was always the intention of the authorities that he should stay at Okehampton three weeks only, and should then return to Exeter, and that leave to return to Exeter every night would have been granted as a matter of course, or if refused only refused on account of difficulty of communication, and not because his presence was required at Okehampton in the night time, we should have thought there were strong grounds for contending that there was a constructive inhabitancy. As, however, there was no inhabitancy in fact during the three weeks in question, it lay on the claimant to prove facts establishing a constructive inhabitancy, and this in our judgment he has failed to do. We were pressed on the one side with the case of *Ford* v. *Hart* (1) and on the other with that of *R.* v. *Mitchell.* (2) In our judgment this case falls within the principles laid down in *Ford* v. *Hart.* If the two cases are inconsistent, we think the later decision should be followed.

[His Lordship then intimated that their decision in *Ford* v. *Barnes* also applied to the case of *Ford* v. *Elmsley.*]

Judgment in the various appeals accordingly.

Solicitors for the various appellants: *Speechly, Mumford, & Landon, for Plummer & Fielding; Terrell & Atkinson; J. E. Fox & Co., for H. & B. J. Ford.*

Solicitors for the various respondents: *Wyatt, Hoskins, & Hooker; H. Russell; S. D. Hamilton, for J. W. Friend.*

(1) Law Rep. 9 C. P. 273. (2) 10 East, 511.

E. L.

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Nov. 5.

WATSON, Appellant; BLACK, Respondent.

Parliament—County Vote—Equitable Freehold—Lands vested in Trustees for Purposes of a voluntary Association—Stock Exchange.

Where an association of persons has purchased land for the purposes of an undertaking, and vested it by deed in trustees and managers upon such terms and conditions that, while the trusts of such deed subsist, the individual members of the association are respectively entitled only to a share in the net profits of the undertaking carried on upon the land, such members have not an equitable freehold in the land so as to acquire the county franchise, although the association is not incorporated or registered as a joint stock company, but is a mere voluntary association without statutory powers or restrictions.

Baxter v. *Brown* (7 M. & G. 198) discussed and distinguished.

Case stated by one of the revising barristers for the county of Middlesex.

The facts were in substance as follows:—

Objection was duly made to the name of the appellant being retained on the list of ownership voters for the parish of St. Bartholomew by the Exchange in the Hornsey division of the county of Middlesex. The name stood on the register for the parish as follows: "Watson, Charles William, 2, Crown Court, Threadneedle Street, E.C., Share in freehold tenements, Stock Exchange."

The appellant was one of 1040 proprietors in the undertaking called the Stock Exchange, situate in the parish of St. Bartholomew by the Exchange, in the city of London.

The name of the appellant appeared as an existing voter on the list of voters in force at the time of the passing of the Representation of the People Act, 1884.

The objects of the said undertaking, as defined in an indenture dated the 31st of December, 1875, were the maintenance of the building called the Stock Exchange, belonging to the said proprietors, with its appurtenances, and the erection and maintenance of any other buildings in the city of London, and providing the same with suitable furniture, fittings, and accommodation, and the employing of the said buildings already erected or to be erected for the transacting of buying and selling English and foreign stocks and shares in public and other companies, with,

under, and subject to the powers and regulations of the said deed, and the rules and regulations to be made pursuant thereto.

The said undertaking was first constituted under the provisions of a deed of settlement dated the 27th of March, 1802, a copy of which was annexed to the case. By the indenture of the 31st of December, 1875, which was made under powers reserved in the deed of 1802, between the trustees and managers at the date of the said indenture of the 31st of December, 1875, and the then proprietors (including the predecessor in title of the appellant), the said deed of 1802 was annulled, except as appeared by the the deed of 1875, a copy of which was also annexed to the case.

Except so far as the said deed of 1802 may subsist and be in force, the Stock Exchange is governed and regulated by the said deed of 1875.

From the recitals of the indenture of 1802 it appeared that certain persons, parties to the deed, had associated themselves together for the purpose of providing a Stock Exchange in London, and that sums of money had been subscribed and land purchased with part of such money for the purpose. The deed then proceeded to vest the lands in certain of such parties as trustees upon the trusts thereinafter declared. It was declared that the lands so purchased and the remainder of the moneys subscribed should be considered the capital or stock of the "undertaking," and should be divided into 400 shares of 50*l.*, and that the parties to the deed should be the proprietors thereof proportionally to the amount of the sums of money set opposite their respective names in the schedule. It was further provided that the funds of the undertaking should be vested in the trustees.

Provision was made for the management of the undertaking partly by the trustees, and partly by a committee for general purposes elected at an annual meeting of proprietors and subscribers, for the investment of funds received from time to time, for the declaration of annual dividends, for the admission of subscribers to the Stock Exchange, and the fixing the annual rate of subscription at which they should be admitted to attend and transact business there, and for other matters. It is unnecessary, however, to give these provisions in detail, as they were for the most part superseded by the deed of 1875.

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By the indenture of the 31st of December, 1875, in pursuance of the powers reserved for that purpose in the deed of 1802, fresh trusts were declared with respect to the property then vested in the trustees of that deed. It was provided that the hereditaments and premises and other property of the undertaking should be vested in certain trustees and managers freed from the trusts of the former deed, except so far as expressly reserved or confirmed, upon the trusts and subject to the covenants, agreements, and declarations thereinafter contained, and it was thereby covenanted and agreed and declared between the parties thereto as followed. The principal covenants and provisions of the deed were in substance these. It was provided that "proprietors" should mean the persons for the time being registered as shareholders in the undertaking: that members should mean persons from time to time entitled to attend, and in their own right to transact business on the Stock Exchange in accordance with the deed: that the capital or stock of the undertaking should consist of the hereditaments and premises described in the first schedule, and all other the property real and personal vested in the trustees and managers in trust for the purposes of the undertaking, and that the same should be deemed to be of the nominal value of £240,000, divided into 20,000 shares, on each of which the sum of £12 was credited and deemed to be paid up, and every share should be distinguished by a denoting number. Provision was made for the exchange of the existing shares of the proprietors for the new shares. A share register was to be kept and certificates issued of the shares, and calls, if necessary, might be made on such shares. Every share in the undertaking was to be transmissible as personal estate. The shares were made transferable by transfer in writing in the form determined by the trustees and managers, and a register of transfers was to be kept. No transfer, however, could be made to any person not at the date thereof a member of the Stock Exchange, or to any person not approved by the trustees and managers. Shares of proprietors ceasing to be members of the Stock Exchange, dying, or becoming bankrupt or lunatic, were to be transferred to some other person subject to the conditions of the deed, within twelve months, and, if not so transferred, the trustees and managers might purchase or

sell the same, subject to the conditions of the deed, and, if they purchased, might pay for the shares out of the funds of the undertaking. It was provided that the trustees and managers should have the management of the property, moneys, funds, and securities, and affairs of the undertaking, and might for that purpose do all acts not specially reserved to a general meeting or the committee for general purposes. They were to appoint and remove secretaries, clerks, door-keepers, porters, and other officers and servants, and fix their salaries and wages, and pay the same out of the funds of the undertaking. They were also empowered to pay pensions to such officers or servants. They were to pay out of the funds of the undertaking all rents, rates and taxes, and other outgoings and expenses. They were empowered to purchase or take on lease any freehold or leasehold hereditaments for the purposes of the undertaking. They might on behalf of the undertaking, under the authority of a special resolution, borrow money on mortgage of any part of the property of the undertaking. They were to settle the entrance fee or fees, if any, and annual subscription at which members and their clerks should be admitted to attend and transact business at the Stock Exchange. They were to fix the charges to be made for the use of desks, sittings, drawers, and other exceptional accommodation to be permitted to members, and for the use of boxes and safes in the strong rooms of the Stock Exchange. It was further provided that all moneys belonging to the undertaking, and not required for immediate use, should be invested in such securities or otherwise employed as the trustees and managers should from time to time determine. No person, whether a proprietor or not, other than such persons as should have been admitted members by the committee for general purposes, and their clerks, was to be permitted to enter or frequent the Stock Exchange. Provision was made for the holding of ordinary and extraordinary general meetings of the proprietors. It was provided that a general meeting might from time to time resolve that any part of the profits of the year, not exceeding 10 per cent., should be appropriated to the reserve fund, which was to be applicable to repairs and maintenance of the buildings belonging to the undertaking: that all dividends on shares should be declared by a general meeting, and should be paid only out

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of the net profits of the undertaking: that the net profits of the undertaking should be the sum declared to be such by the trustees and managers: and that no larger dividend should be declared than might be recommended by the trustees and managers, but that the general meeting might, if it thought fit, declare a smaller dividend. A committee for general purposes was to be annually elected by the members of the Stock Exchange, which committee was to admit such persons, whether proprietors or not, as they thought proper, to be members of and to attend and frequent the Stock Exchange, for the transacting therein the business of a stockbroker or jobber, upon payment of the annual subscription fixed by the trustees and managers for such admission; and such committee was to regulate the transaction of business on the Stock Exchange, and to make rules and regulations with regard thereto. They had also power to expel or suspend members. Power was reserved to the proprietors by special resolution to be passed by a majority of two-thirds of the proprietors to repeal or alter the trusts of the deed and make new regulations for the management of the affairs of the undertaking or the trusts thereof.

The land upon which the Stock Exchange and its appurtenances are built is freehold. The income of the Stock Exchange is made up almost entirely of fees paid for admissions to the Stock Exchange, and charges for the use of desks, sittings, drawers and other exceptional occupation, and for the use of boxes and safes in the strong rooms; and, as to about one fiftieth part of the said income, of dividends or interest on investments in Government and other securities. The gross annual value of the land and buildings was more than sufficient to yield to each proprietor the clear yearly value of 40*s.* over and above all charges. It was stated and admitted at the revising barrister's court that the clear annual value of the said land and buildings was of an amount which, when divided by the number of proprietors, gave a sum of not less than 10*l.* for every such proprietor, but, after the said court was held, and the barrister's decision given, the appellant informed the barrister that certain of the proprietors whose names were marked with a cross in the schedule did not receive and were not entitled to as much as 10*l.* a year from the said

income, but were entitled to more than 40*s.* a year, viz., sums of 4*l.* or upwards, but less than 10*l.*

The undertaking of the Stock Exchange has never been registered as a company under the Companies Acts or at all, nor has it been incorporated.

The names of other persons whose names appeared in a schedule to the case were objected to under similar circumstances to those in the appellant's case.

It was objected to the retention of the name of the appellant on the register, inter alia, that the share or interest of any proprietor of the Stock Exchange is not an interest in real estate, or at any rate not such an interest as to entitle him to the franchise.

The revising barrister decided in favour of the objection, and expunged the names of the appellant and other persons in the schedule from the list.

Oct. 31. *Horace Davey, Q.C.* (*Mattinson* with him), for the appellant. The proprietors of the Stock Exchange are not a corporation: they are jointly the beneficial owners of the freehold in equity, and they derive income from the property, which is managed on their behalf by the trustees and managers under the conventions and regulations established by themselves. They leave it to the discretion of the trustees whether it is safe to divide profits in any year, but it is found as a fact that the profits divisible exceeded 40*s.* for each proprietor. These conventions and regulations established from time to time by themselves do not in the least derogate from their position as equitable owners of the freehold. It is not in any wise like the case of a joint stock company created under a statute. It would be competent to the proprietors by agreement among themselves at any time to put an end to the Stock Exchange, and apply the property to other purposes. As by agreement they impressed certain uses on the property, so by agreement they could divert the property to other purposes. The fallacy in the revising barrister's decision is that he treats the statutory restrictions upon the property of a joint stock company as analogous to the restrictions in the present case, which are merely the creation of agreement, and which may be removed by those who imposed them. Where a voluntary association of

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persons by subscription raise a fund and purchase land with the object of providing premises to be used for the purposes of a particular business, as for example a Stock Exchange, they are at liberty at any time, by agreement among themselves, to alter the purposes to which the premises are applied and to dispose of them in any way they think fit. They are the beneficial owners of the freehold. This case is on all fours with the case of *Baxter* v. *Brown* (1), and is distinguishable from the class of cases of which *Freeman* v. *Gainsford* (2) is an example, where the case has been one of a corporation or a company the ownership of which is for particular statutory purposes, and subject to particular statutory restrictions. The provision that the shares are to be considered as personalty only concerns the devolution of the property: partnership property is in the contemplation of equity always personalty for some purposes; but such a provision has no application to the franchise.

Sir H. James, Q.C. (*H. Greenwood* with him), for the respondent. By the 74th section of 6 Vict. c. 18, a cestui que trust is not entitled to a vote unless he is in actual possession or receipt of the rents and profits. The proprietors of the Stock Exchange are not, while the trusts of the deed of 1875 are subsisting, in actual possession or receipt of the rents and profits of an estate of inheritance within the meaning of the statute. The trustees and managers have power to prevent the declaration of any dividend in any given year, and to apply the funds to the purchase of land for the purposes of the undertaking in their discretion. They may refuse to allow a transfer of shares to any person not approved by them. A proprietor may be expelled from membership of the Stock Exchange and then cannot continue to hold his shares. There are many other provisions of the deed which are quite inconsistent with the notion that the proprietors are really equitable owners of the freehold in actual possession or receipt of the rents and profits. Assuming it to be true that the proprietors might revoke these trusts, while they subsist the interest of the proprietors is not in the rents and profits of the land but merely in the net profits of the undertaking carried on upon the land. They are shareholders in the undertaking, and nothing more. The profits of the undertaking do not proceed

(1) 7 M. & G. 198. (2) 18 C. B. (N.S.) 185; 34 L. J. (C.P.) 94.

from the realty only. They include sums received from investments in personalty and paid for the use of desks, sittings, and safes in the strong-rooms. The proprietors do not hold an equitable estate of inheritance, but something which will last only as long as they are members of the Stock Exchange.

The test is not whether the association is incorporated; the members of it, though not incorporated, may have divested themselves of any interest in the land for the time being, reserving only a right to a share of the net profits of the undertaking. If this association had come into existence after 1862 it would have had to be registered, and then it is admitted that the members would not have been qualified. Can the mere fact of registration or non-registration be the test? In the case of *Baxter* v. *Brown* (1) the facts were altogether different from those of the present case. That case has been much doubted. [He cited *Bennett* v. *Blain* (2); *Myers* v. *Perigal* (3); *Spencer* v. *Harrison* (4); *Watson* v. *Spratley*. (5)]

Horace Davey, Q.C., in reply. The rents and profits are received and applied by the managers and trustees on behalf of the proprietors, whether they are divided by way of dividend or carried to reserve fund, or invested or applied in any other manner for their benefit. The proprietors might at any moment by agreement among themselves require the profits to be handed over to them. In the cases cited the proprietors could not divert the property from the purposes for which they were associated without having recourse to the statutory machinery of a winding-up. It is not contended that the test is whether the association is actually incorporated. The Joint Stock Companies Acts prior to 1862 did not make the companies under them corporations. The distinction is between cases of corporations or quasi corporations and those of purely voluntary associations of persons, who buy land and vest it in trustees for a particular purpose under regulations established by themselves by way of contract which they may revoke at any time.

Cur. adv. vult.

(1) 7 M. & G. 198.
(2) 15 C. B. (N.S.) 518; 33 L. J. (C.P.) 63.
(3) 2 D. M. & G. 599, 622.
(4) 5 C. P. D. 97.
(5) 10 Ex. 222.

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Nov. 5. The judgment of the Court (Lord Coleridge, C.J., Grove and Cave, JJ.) was delivered by

CAVE, J. The question in this case is whether the appellants have an equitable interest in land and are in the receipt of the rents and profits thereof within the meaning of s. 74 of 6 Vict. c. 18.

In our judgment it is too clear for serious argument to the contrary that the shareholders in an unincorporated company may by arrangement among themselves divest themselves of all interest in the real property of the company while retaining an interest in the profits of the concern. That proposition is distinctly laid down in *Bennett* v. *Blain* (1), and is supported by the earlier decisions of *Bulmer* v. *Norris* (2), *Watson* v. *Spratley* (3), and *Myers* v. *Perigal* (4), and by the subsequent case of *Freeman* v. *Gainsford.* (5)

It was admitted that this was so where the company was incorporated, but Mr. Davey sought to draw a distinction between corporations and companies registered under an Act of Parliament and mere partnerships formed under no Act of Parliament.

It is clear, however, that the judgment in *Bennett* v. *Blain* (1) does not proceed on any such distinction. A number of persons may agree among themselves that lands shall be bought and vested in trustees upon trusts which shall give the members no equitable interest in those lands, but only an interest in profits to be made by the use of them. If they so agree, then so long as that agreement lasts the members have no equitable interest in the land, but only an interest of the nature of personalty in the profits of the undertaking.

The case of *Baxter* v. *Brown* (6) was relied on. That case has been sometimes doubted and sometimes distinguished. If the Court there meant to lay down the principle that members of an association cannot by agreement among themselves divest themselves of any equitable interest in lands purchased for the

(1) 15 C. B. (N.S.) 518; 33 L. J. (C.P.) 63.
(2) 9 C. B. (N.S.) 19; 30 L. J. (C.P.) 25.
(3) 10 Ex. 222.
(4) 2 D. M. & G. 599, 622.
(5) 18 C. B. (N.S.) 185; 34 L. J (C.P.) 94.
(6) 7 M. & G. 198.

purposes of association, and cannot vest those lands in trustees free from such equitable interest, that case is opposed to a cloud of authorities, and is not law. If, however, the Court there only meant to decide that in that case the parties had not agreed to divest themselves of their equitable interests, the case is distinguishable.

In the case now under consideration it is clear that the members meant to vest the freeholds in the trustees free from any equitable interest in the individual members in the land itself, and to give to the members of the association an interest in the profits of the concern only. There is nothing contrary to law in such an arrangement, but one consequence of it is that the individual members have no equitable interest in the freeholds vested in the trustees, and consequently the decision of the revising barrister was correct, and must be affirmed.

Decision affirmed.

Solicitors for appellant: *Travers-Smith & Braithwaite.*
Solicitors for respondent: *Corbin & Greener.*

E. L.

[IN THE COURT OF APPEAL.]

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FOSKETT, APPELLANT; KAUFMAN, RESPONDENT.

*Parliament—Borough Vote—Registration of Voters—Description of Qualification—Houses in Succession—Power to amend—*41 & 42 *Vict. c.* 26, *ss.* 24, 28.

Sub-s. 13 of s. 28 of 41 & 42 Vict. c. 26, limits the general power of amendment given to the revising barrister by sub-s. 1 of that section, except where the voter has made a declaration under s. 24 of that Act in order to correct an erroneous description of his qualification on the list; and, therefore, where no such declaration has been made, the revising barrister has no power to make an amendment which would change the description of the qualification as it appears in the list, as by stating the qualification to be in respect of the occupation of two houses in succession during the qualifying period, when it appears in the list to be in respect of the occupation of one of such houses only.

Bartlett v. *Gibbs* (5 M. & G. 81) approved and acted on.

Porrett v. *Lord* (5 C. P. D. 65) dissented from.

APPEAL from the Queen's Bench Division affirming the decision of the revising barrister for the borough of Tower Hamlets.

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The name of the appellant, Henry Foskett, appeared in Form E for the hamlet of Mile End New Town of the list of parliamentary voters as the occupier of a dwelling-house, and the entry and description on the said list were as follows:—

Name of Voter.	Place of Abode.	Nature of Qualification.	Name and Situation of Qualifying Property.
Foskett, Henry	5 Victoria Cottages	Dwelling-house	5 Victoria Cottages

The respondent duly objected to the name of the appellant being retained on the list of voters for the said division of the said borough, upon the ground that the appellant had not been in occupation of the premises as described therein for the period required by law to give him a vote.

The following facts were proved:—

The appellant had occupied in the borough during the whole of the qualifying period two dwelling-houses in immediate succession, namely, High Street, Wapping, and the said 5, Victoria Cottages, and such his occupation of those two dwelling-houses would have given him a complete qualification, if in addition to his name and place of abode as above stated the nature of qualification had in the third column of the said list been described as "dwelling-houses in succession," and the name and situation of the qualifying property had been described in the fourth column as High Street, Wapping, and 5, Victoria Cottages.

The name of the appellant did not appear upon the register of voters in force for the year 1885 for any qualification, and it appeared that his name had been inserted by the overseers in the list in the manner above-mentioned, because they had obtained from the person rated or liable to be rated in respect of the premises 5, Victoria Cottages, a return according to Form [A] of the general forms to Schedule 3 of the Registration Act, 1885, according to which it was by mistake stated that the appellant on the 15th of July, 1884, and up to the date of the return, had been an inhabitant occupier of the dwelling-house 5, Victoria Cottages, and the appellant had been found by the overseers to be inhabiting that dwelling-house at the date of the inquiries made by them pursuant to the provisions of the Act, and his

name had been placed and still remained upon their rate-book in consequence of the said return.

It was urged on behalf of the appellant that under these circumstances the revising barrister ought to amend the third column of the list by altering "dwelling-house" to "dwelling-houses in succession," and the fourth column by altering "5, Victoria Cottages," to "High Street, Wapping, and 5, Victoria Cottages," upon the authority of the cases of *Hitchins* v. *Brown* (1), and *Ford* v. *Hoar*. (2)

The revising barrister decided that neither of these cases applied, and that he was bound by the case of *Porrett* v. *Lord* (3), and he expunged the name of the appellant from the said list.

The name of one other person, whose name and qualification were set out in the schedule thereunto attached, was objected to under similar circumstances, and his name also expunged from the said list.

If the Court should be of opinion that the decision was wrong, the register was to be amended by inserting the name of the appellant and the name of the said other person in the said list.

Willis, Q.C. (*Markwick*, with him), for the appellant. The revising barrister had power to amend the list, and he ought to have exercised such power. The case of *Porrett* v. *Lord* (3), on the authority of which the revising barrister acted, was based on the case of *Bartlett* v. *Gibbs* (4), which was decided on the power of amendment given to the barrister by s. 40 of 6 & 7 Vict. c. 18. In that last mentioned case it was held that where the qualification depended on the occupation of houses in succession according to s. 28 of the Reform Act, 2 Wm. 4, c. 45, all such houses must be described in the fourth column, and that where they do not so appear the barrister has no power under that 40th section of 6 & 7 Vict. c. 18, to amend.

[LORD ESHER, M.R. *Bartlett* v. *Gibbs* (4) is precisely like the present case.]

Bartlett v. *Gibbs* (4) was wrongly decided. The nature of the qualification there was the occupation of a house according to

(1) 2 C. B. 25.
(2) 14 Q. B. D. 507.
(3) 5 C. P. D. 65.
(4) 5 M. & G. 81.

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s. 27 of the Reform Act, and it was rightly described in the third column. The 28th section of the Reform Act does not give a new qualification in respect of the occupation of houses in succession, but it only enables the qualification conferred by s. 27 in respect of the occupation of a house not to be lost where such occupation during the whole qualifying period has not been of the same house, but of different houses in immediate succession. The mistake the Court made in *Bartlett* v. *Gibbs* (1) was in considering that the two sections 27 and 28 of the Reform Act gave two different qualifications, so that the qualification in respect of the occupation of two houses in succession was a different description of qualification from that in respect of the occupation of one house. The case of *Hitchins* v. *Brown* (2) shews that the nature of the qualification in respect of the occupation of two houses in succession may be correctly described in the third column as "house," provided the fourth column shews the occupation of the two houses in succession. The 40th section of 6 & 7 Vict. c. 18, has been repealed, and the case must now depend on the construction of s. 28 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26) which has been substituted for that 40th section. Not only does that 28th section give a larger power of amendment than that which was given to the barrister by the repealed s. 40 of 6 & 7 Vict. c. 18, but s. 24 of that Act, 41 & 42 Vict. c. 26, gives the voter a new power, namely, to make a declaration as to his correct qualification. It states that a person on the list of voters "whose name or place of abode or *the nature of whose qualification or the name or situation of whose qualifying property* is not correctly stated in such list, or in respect of whom there is any other error or omission in the said list, may, whether he has received a notice of objection or not, if he thinks fit, make and subscribe a declaration in the form" there referred to, which is Form M in the schedule to that Act. That Form M gives an example of a voter's qualification in respect of a "House, 24, Shire Lane," being wrongly described in the list as "Shop, 2, Shire Lane," and which, of course, the barrister might so amend, as if it was not intended that he should act upon such declaration under the power of amendment given by s. 28, there

(1) 5 M. & G. 81. (2) 2 C. B. 25.

would be no use in making the declaration. "Shop" is a distinct qualification of itself and a different one to "house," and the example given in Form M, coupled with the wide words in the 24th section, confirms the intention of the legislature to empower the barrister under s. 28 to amend any mistake in the list, including such as was asked to be made in this case, without the restriction sought by the respondent to be put on sub-s. 13 of that 28th section. That sub-section does not, like the corresponding part of s. 40 of 6 & 7 Vict. c. 18, begin with the words "provided always," but it begins with very different words, viz., "except as herein provided," which exception does not, as it is contended on behalf of the respondent, refer only to the preceding sub-s. 12, but to the whole of s. 28, as was considered by Cave, J., in giving the judgment of the majority of the Court in *Ford* v. *Hoar* (1). Therefore, in order to give full force to sub-ss. 1 and 2 of s. 28, which are excepted from sub-s. 13, the revising barrister *shall* correct any mistake in any list, and he *may* correct any mistake in any claim.

[LORD ESHER, M.R. That construction would make sub-s. 13 inapplicable in any case.]

It can apply to claims. The list is what the overseers make out; the claims are made by the voters, so that there may well be a distinction between correcting a mistake in the one case and not in the other. *Pickard* v. *Baylis* (2) shews that as to claims the barrister does not have a list of them before him, but only a catalogue.

It may, however, be that "the mistake" which in sub-s. 1 the barrister is directed to correct is the mistake which is in the list made out by the overseers, an accidental mistake, and for which the voter ought not to suffer, and that that sub-section does not apply to a wilful mistake or one made by the voter himself in the list or catalogue of claims.

[LORD ESHER, M.R. *Porrett* v. *Lord* (3), if rightly decided, is an authority entirely against this appellant; but even if not rightly decided, so that there may be a power of making the amendment sought for in a case where a declaration has been

(1) 14 Q. B. D. 507, at p. 513. (2) 5 C. P. D. 235.
(3) 5 C. P. D. 65.

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made pursuant to s. 24, that will not help this appellant, as no such declaration was made here.]

That s. 24 does not apply to sub-s. 13 of s. 28, which applies to "list or claim," whereas s. 24 applies only to a mistake in the list. Lord Coleridge, C.J., in *Ford* v. *Hoar* (1), considered that s. 24 was limited to the cases to which sub-s. 12 of s. 28 applied. *Lynch* v. *Wheatley* (2), which followed *Ford* v. *Hoar* (1), further supports the contention of the appellant as to the power of the barrister to correct such a mistake in the list as occurred here.

Grantham, Q.C. (*Richards*, with him), for the respondent. The amendment asked for in the present case was to change the description of the qualification, and therefore not one which the revising barrister had power to make. It was not to correct such a mistake as the revising barrister would have had power to correct under s. 40 of 6 & 7 Vict. c. 18, as pointed out by Tindal, C.J., in *Wood* v. *Overseers of Willesden* (3), or as illustrated by the case of *Bendle* v. *Watson* (4), where in consequence of a change in the number on the street door of the house the number of the house was wrongly inserted in the list. The correction of any such mistake is only for more clearly and accurately describing the qualifying property, and not to change its description. *Hitchins* v. *Brown* (5) does not conflict with *Bartlett* v. *Gibbs* (6); on the contrary, the Court there expressly recognised *Bartlett* v. *Gibbs* (6) as being rightly decided, and they distinguished it from the case before them of *Hitchins* v. *Brown*. (5) The declaration which may be made under s. 24 of 41 & 42 Vict. c. 26, is where the voter has omitted to make a new claim; and it enables him to supply the information, upon which the revising barrister would be empowered under sub-s. 1 of s. 28 of that Act to correct the mistake in the list. The exercise of such power must, however, be subject to the restraint imposed thereon by sub-s. 13, so that the revising barrister must not alter the description of the qualification so as to make it a different one from what it is on the list.

Willis, Q.C., replied.

(1) 14 Q. B. D. 507, at p. 515.
(2) 14 Q. B. D. 504.
(3) 2 C. B. 15.
(4) Law Rep. 7 C. P. 162.
(5) 2 C. B. 25.
(6) 5 M. & G. 81.

LORD ESHER, M.R. In this case there was a list of voters made out by the overseers, which was a list within the meaning of the Registration Acts to be revised. In that list the nature of the qualification of the appellant is set down as "dwelling-house," and the situation of that qualifying property is put as one house only—5, Victoria Cottages. There is nothing in such list about houses in succession, nor are two houses named. That being the list as made out by the overseers, the proposed voter did not act under s. 24 and send in any such declaration as is mentioned in that section, but when the case came on to be heard before the revising barrister he proved in fact that he had occupied in immediate succession not only the house described in the list, namely, 5, Victoria Cottages, but another house which was not mentioned or referred to in the list; so that if the revising barrister had power to amend, he had the material by which he could have amended. The question is whether under these circumstances in point of law he could amend.

Now the power of the revising barrister is of course a statutory power, which it would seem is now contained in 41 & 42 Vict. c. 26. In the present case it was said on behalf of the appellant that the description of his qualification in the list was right, and that it did not need any amendment, for it stated his qualification to be the occupation of a dwelling-house. It is true that it was stated to be the occupation of a dwelling-house No. 5, Victoria Cottages, but he would fail if he tried to prove that, because in fact he had not occupied such dwelling-house for twelve months. Therefore the appellant could not maintain his right to be registered in respect of the qualification so described in the list. How did he propose to amend his case? By proving he was entitled to vote in respect of the occupation of two houses, the one in immediate succession to the other. Is that or is that not a different qualification from the qualification of occupying a house for twelve months? The two qualifications are described in the Reform Act, 2 Wm. 4, c. 45. In s. 27 there is a qualification in respect of the occupation of a house for twelve months: that is one qualification. In s. 28 there is the right to be registered if a man occupies two houses in immediate succession, though he occupies neither of them for twelve months, but the two together for twelve months.

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If we had only to deal with the Reform Act I should say that the qualifications in these two sections are different and distinct, but in the case of *Bartlett* v. *Gibbs* (1) it was decided that on the true construction of that Act of Parliament they are two distinct qualifications. That decision has been acted upon ever since, and Parliament, with full knowledge that that was the construction put upon the Reform Act, has not altered anything with regard to it. It would therefore be contrary to every rule of conduct of the Courts after a case had been decided for so long a time, and after the matter had been subsequently before Parliament, and yet no alteration made therein, if this Court were to alter the construction which had been decided to be the true construction of the statute. We must therefore say that a qualification in respect of successive occupation of two dwelling-houses in a borough is a distinct qualification from a qualification by reason of the occupation of a single dwelling-house.

Then can that description be amended? That depends on the power of the revising barrister, which is now given by the 28th section of 41 & 42 Vict. c. 26, and we must consider what is the true construction of that section. In construing that section it is impossible to keep out of view the fact that the 40th section of 6 & 7 Vict. c. 18, was in existence and known to Parliament when 41 & 42 Vict. c. 26, was passed and therefore the existence of that 40th section is to be taken into account in order to construe this 28th section.

Now this 28th section says, "A revising barrister shall with respect to the lists of voters for a parliamentary borough and the burgess lists for a municipal borough which he is appointed to revise, perform the duties and have the powers following." What is the first power? The 1st sub-section says: "He shall correct any mistake which is proved to him to have been made in any list."

In the present case there was proved to have been a mistake in the list, that is to say, an erroneous description of the person's qualification, and if that 1st sub-section stood alone, I confess it is as clear that the revising barrister could alter that mistake, as he could have done under the 40th section of 6 & 7 Vict. c. 18, if the beginning of that 40th section had stood alone and there had been no proviso in that section.

(1) 5 M. & G. 81.

Then the question is whether this power is limited, and although he may amend some mistakes, whether he can amend all mistakes: or, at all events, whether he can amend the mistake which has been now made. On the one side it is said that his power to amend such a mistake as this is taken away by the 13th sub-section: whilst on the other side it is said that it is not, and that the 13th sub-section does not limit this power. It has been held, and I think rightly, under 6 & 7 Vict. c. 18, s. 40, that by reason of the proviso in that section such an error as has appeared in the present case could not be amended: because, although the earlier part of that 40th section gave the power to amend any mistake, including any mistake in the qualification, yet the proviso took away that power where the mistake was in the description of the qualification, and such a mistake could not be amended.

Now comes the question whether the 13th sub-section of s. 28 of 41 & 42 Vict. c. 26, has the same effect. It is not in terms a proviso, but it is, "except as herein provided." On behalf of the appellant it is stated that those words "except as herein provided," leave in force the whole and full meaning of sub-s. 1. If that is the true interpretation of "except as herein provided," then these words which come afterwards, "nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list," are wholly futile, and have no effect. It was then suggested that a "mistake" in sub-s. 1 only meant a mistake which was not wilful, and that sub-s. 13 would take away only the power to amend where the mistake was wilful. This appears to me to be an unreasonable interpretation. I think we must, if possible, give such an interpretation to "except as herein provided" in sub-s. 13 as will reasonably give effect to the whole of that which follows.

Now can such reasonable interpretation be given to those words, "except as herein provided?" To my mind it can. Sect. 24 is altogether a new provision, and is one which gives a new facility to a voter, in respect of whose qualification a mistake has been made in the list. Where the qualification was misdescribed, the voter could, under the old Act, correct it by sending in a new claim, and if he did so in the proper time, and in the proper form, then, though his name would be struck out of the overseer's

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list, because such list could not be amended, yet it would be placed on the register with the corrected description of qualification according to the claim. Now this 24th section seems to me to give a double relief to the voter, the nature of whose qualification has not been correctly stated in the overseer's list. It gives him the means of proving his claim without coming in person before the revising barrister. That is a great relief; it seems to me that when one looks at that section together with the Form M. given in the schedule to that Act, that section enables the voter not only to produce evidence in respect of his claim, but that it really gives him the power to make a declaration for correcting a qualification which is wrongly described. The Form M. assumes that he can do so, and when one looks at the section itself, it seems to me there are words which, construed by the form, shew that he can make a declaration that his qualification is a different one in nature from that which is described in the list. The 24th section, I think, gives the voter the same power which he would have had by making a new claim, and it gives him in addition a means of proving it. If that be so, the 13th sub-section would have struck out that power, unless there were put in it the words at the beginning "except as herein provided," which words save to the voter the right which is given him under s. 24, and so they have a very important effect; but it seems to me that the exception cannot be carried further, and that it must be limited to excepting the rights under s. 24, and possibly also under sub-s. 12, and that it cannot have the effect of making absolute the words in sub-s. 1. Therefore the effect of the exception is this. If the voter acts under s. 24, then the revising barrister can alter the overseer's list according to the declaration, but if the voter, instead of availing himself of the power given by s. 24, inadvertently waits until the holding of the Revision Court, and then goes before the revising barrister and offers proof of his qualification, the revising barrister has no power, any more than he had before, to alter the description of the qualification as it appears in the list.

The power of altering the qualification was taken away from the revising barrister by s. 40 of 6 & 7 Vict. c. 18, in order to hold the scale fairly and evenly, so far as possible, between the

objector and the voter: because otherwise, if a person should come and claim at the Revising Court in respect of a qualification which was a wholly different one from that described in the list, the objector would be taken by surprise and would have no fair opportunity of supporting his objection, or of previously inquiring as to whether his objection was valid or not. Now, if the voter acts under s. 24 of 41 & 42 Vict. c. 26, then the reason for taking away this power of the revising barrister does not apply, because this declaration must be sent to the clerk of the peace or town clerk, as the case may be, by a certain date, and the objector has the power of seeing that declaration, and the opportunity of inquiring whether the new claim and the declaration in support of it are true or not, so that he is not taken by surprise at the hearing; and there is a very good reason why the limitation of the revising barrister's power should not take effect in that case. That seems to me to be the true construction of the Act, and if that be so, then in this case, as no such declaration was made, the revising barrister had no power to amend.

With regard to the case of *Porrett* v. *Lord* (1), what I have said as to the effect of s. 24 on sub-s. 13 of s. 28, would make that decision inconsistent with the reasons of our present decision, and I think it right to say that the decision in *Porrett* v. *Lord* (1) was, in my opinion, too strict, and was one with which we cannot agree. It seems not necessary on the present occasion to give any opinion upon the other cases which were cited. In my opinion, for the reasons I have given, the revising barrister had no power to make the alteration which he was asked to make, and consequently his decision was right.

COTTON, L.J. In this case the revising barrister struck out the name of the appellant, Henry Foskett, from the list of persons entitled to vote, and he did so on this ground, that the qualification claimed was the occupation of a dwelling-house in 5, Victoria Cottages, and that the appellant had not occupied such dwelling-house for a sufficient length of time. The revising barrister was asked to alter the list by putting in the third column "dwelling-houses in succession," and by inserting in the fourth column

(1) 5 C. P. D. 65.

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"High Street, Wapping" in addition to "5, Victoria Cottages." The revising barrister considered he had no power to do so, and, as I said, expunged the appellant's name from the list. The question we have to consider is not whether in the individual case it would have been right for the revising barrister to have made the amendment, but whether under the provisions of the Act of Parliament he had power to make it. The question turns on the 13th sub-section of the 28th section of 41 & 42 Vict. c. 26.

That sub-s. 13 may be said to be divided into two parts. In the first part it limits the power of the revising barrister as to the reception of evidence, and states that "no evidence shall be given of any other qualification than that described in the list or claim." The second part refers to the amending powers of the revising barrister, and states that he shall not "be at liberty to change the description of the qualification as it appears in the list except for the purpose of more clearly and accurately defining the same." But for the words at the commencement of this sub-section, "except as herein provided," the revising barrister could not receive any evidence of another qualification than that mentioned in the list, nor could he have made the amendment.

Now, as I understand Mr. Willis's argument, it was this: that having regard to sub-ss. 1 and 2 in s. 28 of that Act, there is an unlimited power of amendment, either as regards introducing another qualification or not, and that the effect of sub-s. 13 is this: that there is only a restriction on the power given by sub-ss. 1 and 2 where the error is one that has not been made by mistake. But in my opinion that cannot be the meaning of the Act of Parliament, if one can find any other reasonable interpretation by which one can give effect to the words "except as herein provided." It is, I think, material to consider that these sub-ss. 1 and 2 do not refer to evidence being received, but to the power of amendment, whereas this sub-s. 13 refers to both matters and contains a restriction on the power of receiving evidence as well as on the power of amendment. In my opinion it cannot be considered that the Act of Parliament contemplated the overseers making an error in the list intentionally, and one should therefore see if the words "except as herein provided"

cannot be referred to something else than sub-ss. 1 and 2. Whether they refer or not to sub-s. 12, there is s. 24 to which they can, and to which in my opinion they do directly refer.

Sect. 24 enables a declaration for correcting an error in the list to be sent in by any voter, "whose name or place of abode or the nature of whose qualification" "is not correctly stated in such list," and I think that those words, "the nature of whose qualification," allow the declaration to refer not only to an error in the description of the qualifying property, but to some other and different qualification from that in respect of which the voter has been entered on the list, and for which different qualification he must but for this enactment have sent in a new claim. Not only by s. 24 is he allowed to send in such declaration, but the declaration is made evidence receivable before the barrister of the facts which it states. That is to say, evidence to shew that another and different qualification ought to be stated as the qualification of the voter. Then that declaration is open to public inspection at certain times, so that if it be wrong, objection may be taken to it before the revising barrister.

In my opinion this 24th section is distinctly referred to in s. 28, sub-s. 13, by the words "except as herein provided," because what immediately follows is, "no evidence shall be given of any other qualification than that which is described in the list," and s. 24 expressly makes the declaration evidence of the facts declared to, which may be of another qualification.

Then it is stated, and it is an objection which one must consider, that s. 24 in no way refers to any alteration or amendment being made of the list. That is true.

Neither in s. 24 nor in s. 28 is there any express power given to the revising barrister to act on the declaration which has been so sent in, but in my opinion, when s. 24 expressly enables a declaration to be sent in referring to another and a different qualification, and there is general power given to the revising barrister to correct mistakes, we must consider that power is impliedly given to him to amend the list with reference to the matters about which s. 24 has directed him to receive evidence. So therefore, in my opinion, we have here, in s. 24, that to which the exception "except as herein provided" in sub-s. 13 will apply. There may

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be a question, which I need not deal with, whether sub-s. 12 also comes within the exception in this sub-section 13; but at all events, in my opinion, the declaration in s. 24 is that to which such exception does apply.

It is very true that this exception is not introduced by way of proviso to the general powers given in sub-ss. 1 and 2. The 28th section is divided into several sub-sections, which might have interfered with the power arising from s. 24 and sub-ss. 1 and 2, and the exception is therefore introduced as a substantive enactment and not in the terms of a proviso; so that whilst practically interfering to a certain extent with what would be otherwise the effect of sub-sects. 1 and 2, it does not interfere with the rights and powers given by s. 24.

From what I have said, I necessarily agree with the Master of the Rolls in what he has said as to *Porrett* v. *Lord*. (1) In that case there was the declaration under s. 24, but the Court decided that the mistake in the list could not be corrected after that declaration had been sent in, and, in my opinion, that Court, in so deciding, came to an erroneous conclusion.

Then one has to consider this: the restriction on the power imposed by sub-s. 13 is that no evidence is to be received of any other qualification than that which is described in the list; and the restriction as regards amendment is to the same effect; it is, although you may correct the description of that qualification so as to make it more accurate, you cannot have an amendment which, instead of bettering the description of the qualification, introduces another qualification. Is this, then, another qualification from what is stated in the list? The qualification is a house occupation; but it is not an occupation of one house as stated in the list, but an occupation of several houses in succession. It was argued on behalf of the appellant that that was not made by the Reform Act, 2 & 3 Wm. 4, c. 45, a different qualification but I really do not consider that that question is now open to us, because it was expressly decided in *Bartlett* v. *Gibbs* (2) that it was a different qualification; and that was a decision given by a Court consisting of judges of great eminence, and in my opinion it would be wrong of us, although that was not a

(1) 5 C. P. D. 65. (2) 5 M. & G. 81.

decision of a Court of Appeal, to interfere with and set it aside, even if we thought it wrong, after the length of time that has elapsed without its having been ever questioned or reversed, and after Parliament with a knowledge of that decision has passed subsequent Acts which have made no change in what was so decided. In my opinion we ought to follow that case, and therefore I think the revising barrister was right, and that he had no power to amend or alter the qualification in the way suggested.

BOWEN, L.J. I shall add only a few words to what has been said. *Bartlett* v. *Gibbs* (1) decided, first, that the occupation of a house was a qualification of a different nature from the occupation of houses in succession; and, secondly, that a list which described the nature of the qualification under the third column as a dwelling-house, and the name and situation of the qualifying property in the fourth column as a single house, could not properly be corrected into a list which described the nature of the qualification in the third column as houses in succession, and stated in the fourth column the situation and name of the houses so successively occupied. That decision seems to me to have been right, but whether it was right or wrong it is a decision of upwards of forty years old, and, for the reason given by the Master of the Rolls and Cotton, L.J., the Court of Appeal ought not to reverse a decision of that long standing. It follows therefore that this appeal must fail, unless there is something in the Registration Act of 1878 (41 & 42 Vict. c. 26), which materially differs from the language of the Act of 1843 (6 & 7 Vict. c. 18), under which *Bartlett* v. *Gibbs* (1) was decided. Now s. 40 of the Act of 1843 begins with the same general words as s. 28 of the Act of 1878, and enables the revising barrister to correct any mistake which is proved to him to have been made in any list. Then follows the proviso in these words: "Provided always, that whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list." Putting together those general

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words with which the 40th section commenced and the proviso which followed, *Bartlett* v. *Gibbs* (1) decided that the proviso narrowed down the revising barrister's power to amend to within the limits mentioned in the proviso.

Then is there anything different in the Act of 1878 (41 & 42 Vict. c. 26)? That Act in s. 24 does give an additional indulgence to the voter. It provides that he shall be able to make a declaration where the nature of his qualification is not correctly stated in any list, and to send such declaration in by a certain date, so as to be received in evidence by the revising barrister of the facts therein stated. But when we come to compare s. 40 of the Act of 1843 with the parallel section 28 in the Act of 1878, we find that upon the material point which we are considering there is no difference, except that the words "provided always" in s. 40 of the Act of 1843, which cut down the general powers of the revising barrister to amend, are changed in s. 28 of the later Act into the words "except as herein provided."

At first sight it would look as if that change was a very material one. A proviso limits what has gone before and cuts it down; whilst an exception—primâ facie, so far from cutting down what has preceded leaves it standing. But there is a fallacy in assuming that by the substitution of the words "except as herein provided" the force of the proviso has disappeared. There had been an indulgence given to voters by s. 24 for which it was necessary to make an exception, and the draughtsman, having therefore to introduce an exception upon a proviso, omits the words which make it a proviso, and inserts only the words which create the exception to the proviso. Does it follow that sub-s. 13 is not a proviso still? I think it is such just as much as if it began with the words "provided always," the proviso being implied from the collocation of the sentences and from the context. It remains by implication a proviso, although the express words which pointed out that it was a proviso have been converted into something else. The substance of our decision is, I think, this, namely, that the words "except as herein provided" in sub-s. 13 of s. 28 are equivalent to the words "provided always that except as herein provided." If that be

(1) 5 M. & G. 81.

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so, *Bartlett* v. *Gibbs* (1) ought to govern our decision here. I think that the power of amendment which arises under sub-s. 1 coupled with the power of making a declaration under s. 24 is to be read with sub-s. 13 of s. 28. The large power of amendment given by sub-s. 1 is cut down by sub-s. 13, but with this substantial exception, that it is not cut down as to that which s. 24 covers. As regards the case of *Porrett* v. *Lord* (2) I agree in thinking that it treated s. 24 too strictly. I do not think that that case proceeded on a wrong view of the Act generally, but only that it did not sufficiently give effect to s. 24. It is in that respect that we think it is wrong.

Decision affirmed. (3)

Solicitor for appellant: *E. T. Hargrave.*

Solicitor for respondent: *E. T. Hughes.*

W. P.

[IN THE COURT OF APPEAL.]

Nov. 6.

DASHWOOD, APPELLANT; AYLES, RESPONDENT.

Parliament—County Vote—Registration of Voters—Description of Qualification—Power to amend—"Tenement"—41 & 42 *Vict. c.* 26, *s.* 28.

In the overseers' list of occupiers entitled to vote for a division of a county, the "nature of the qualification" of a voter was described as "tenement and garden," and the "description of the qualifying property" was stated to be "part bailiff's tenement." An objection was taken that the nature of the qualification was wrongly described. It was proved before the revising barrister that the voter was an inhabitant occupier of a part of a dwelling-house, and the barrister amended the list by striking out the words "and garden," and inserting the word "dwelling-house" before "tenement":—

Held, by the Court of Appeal, that, looking at the whole entry, the words "tenement and garden" might fairly be read as intended to be used in the vulgar but inaccurate sense of a small house, and to describe the qualification arising from the occupation of a dwelling-house, and consequently that the barrister had power to amend the entry as he had done for the purpose of more accurately defining the qualification.

But *held*, that the proper alteration would have been, to strike out the words "tenement and garden," and substitute the word "dwelling-house."

APPEAL from the Queen's Bench Division, reversing a decision of the revising barrister for the Northern Division of the county

(1) 5 M. & G. 81. (2) 5 C. P. D. 65.

(3) See next case.

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of Dorset, to amend an entry in the occupiers' list of voters for the parish of Hammoon, as published by the overseers.

The case stated by the revising barrister was (so far as is material) as follows:—

"Henry Charles Dashwood, a person named in the list of voters for the parish of Sturminster Newton, duly objected to the name of James Ayles being retained in the occupiers' list of voters for the parish of Hammoon in the said division.

"The following were the facts established by the evidence:—

"The said James Ayles was thus entered in the occupiers' list of voters for the parish of Hammoon in the said division as published by the overseers:

Name of Voter in full, Surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Ayles, James	Hammoon	Tenement and garden	pt. Bailiff's Tenement.

"The said James Ayles occupied a dwelling-house and garden only in the said parish of the annual value of less than 10*l*. The appellant duly served the respondent, James Ayles, with a notice of objection, alleging 'that the nature of the qualification was wrongly described.'

"The names of thirteen other persons in the parishes of Hammoon and Manston, whose names and qualifications are set out in the first and second schedules, were objected to under similar circumstances by the same objector.

"It was proved before me that the respondents were inhabitant occupiers of dwelling-houses and entitled to be so described in the lists, and that it was wholly 'a mistake' of the overseers, and I decided that I had power under sub-ss. 1, 12, and 13 of the 28th section of 41 & 42 Vict. c. 26, or otherwise, to expunge the words 'and garden' from the third column, and to prefix the word 'dwelling-house,' making the nature of the qualification in the third column read 'dwelling-house tenement,' and I retained the name of the said James Ayles and of the said thirteen other persons in the said list. Due notice of appeal from my decision

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was given, and I ordered the appeals in all the aforesaid mentioned cases to be consolidated.

"If the Court should be opinion that my decision was wrong, the registers of the said parishes are to be amended by erasing the names of the said James Ayles and of the said thirteen other persons from the said lists; otherwise to remain."

The Divisional Court (Lord Coleridge, C.J., and Grove and Cave, JJ.) were divided in opinion. Cave, J., agreed with the decision of the Court in *Ford* v. *Hoar* (1), in favour of the power of amendment; Lord Coleridge, C.J., and Grove, J., dissented from it. The barrister's decision was accordingly reversed, but an appeal was allowed.

Crump, Q.C., for the voter. This case is distinguishable from *Foskett* v. *Kaufman*. (2) The amendment which the revising barrister made did not change the description of the qualification, and therefore was an amendment which he had power to make under s. 28 of the Act 41 & 42 Vict. c. 26. By s. 27 of the Reform Act (2 & 3 Wm. 4, c. 45) a qualification for a borough vote was given to the occupier of (inter alia) any house occupied by him "separately or jointly with any land within such borough," of not less than 10*l.* yearly value, and by s. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), a borough vote was given to "an inhabitant occupier" of "any dwelling-house within the borough." The Representation of the People Act, 1884 (48 Vict. c. 3) has repealed s. 27, of the Reform Act, and, in order to assimilate the occupation qualification for counties and boroughs, it has by s. 5 given a vote for either a county or a borough to the occupier of "any land or tenement in a county or borough" of the yearly value of not less than 10*l.* The description given in column three of the present appellant's qualification was merely insufficient or inaccurate, for the entry in the fourth column, "part bailiff's tenement," shews that the tenement was a dwelling-house, and therefore the amendment made by the barrister did not alter the qualification, but only more clearly defined it. "Garden" is not necessarily land, and therefore the words "and garden" might properly be struck out.

The word "tenement" must be taken in its popular sense, not

(1) 14 Q. B. D. 507. (2) Ante, p. 279.

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in its strictly legal sense. In the interpretation clause, s. 11, of 48 Vict. c. 3, it is said that "the expression 'land or tenement' includes any part of a house separately occupied for the purpose of any trade, business or profession."

[He was stopped by the Court.]

J. A. Foote, for the objector. The word "tenement" is the proper word to describe the occupation of "lands and tenements" and not that of a dwelling-house; it describes the occupation which confers the franchise in counties on occupiers who are not occupiers of a dwelling-house: 2 & 3 Wm. 4, c. 45, s. 27; 30 & 31 Vict. c. 102, s. 6; 48 Vict. c. 3, s. 5; 48 Vict. c. 15, sched. 2. The Act has appropriated the word "tenement" to the 10*l.* occupation qualification. The effect of the amendment is to alter the nature of the qualification, and this cannot be done, except when a declaration has been made by the voter under s. 24 of the Act 41 & 42 Vict. c. 26.

In *Friend* v. *Towers* (1) the word "house" was altered to "dwelling-house," but the decision of this Court in *Foskett* v. *Kaufman* (2) removes any difficulty arising from *Friend* v. *Towers*. (1) If the barrister's decision is right, any claim to vote in respect of a 10*l.* occupation in a county could be altered so as to admit evidence of the occupation of a dwelling-house. A "tenement" means a "holding" of anything in the nature of real estate.

LORD ESHER, M.R. In *Foskett* v. *Kaufman* (2) we were obliged to say that there is some limitation to the power of revising barristers as to amendment, but I think we were all of one mind that the intention of the Act of Parliament must have been that that power of amendment should be as large as is consistent with ordinary rules of construction, and as is consistent with a rule which I ventured to enunciate yesterday, namely, that the balance is to be held fairly between an objector and a person claiming to vote.

In my view the revising barrister has two things to consider, his power to amend and the propriety of exercising it. When he has the power to amend he ought not to do so, unless he is of opinion that what he is doing is fair as between the objector and

(1) 10 Q. B. D. 87. (2) Ante, p. 279.

the claimant. Now the only question in the present case is, whether the revising barrister had the power to amend, because, if he had the power, that which he has done shews (at least we cannot say the contrary,) that he was of opinion that he could fairly, as between the objector and the person who claimed to be entitled to vote, make the amendment.

Now if this entry in the overseers' list is to be taken as a description of that qualification to vote in a county which arises by reason of the occupation of land or anything else but a dwelling-house, then that is a different qualification from the qualification which arises from the inhabiting or occupying a dwelling-house, and, if the description is to be so read, our decision in *Foskett* v. *Kaufman* (1) is conclusive that he could not make the amendment, and that he was, in doing what he did, altering the nature of the qualification. But, if he was entitled, reading this entry fairly as between the objector and the voter, to treat it, not as a description of a qualification by reason of the mere occupation of land, but as fairly capable of being read as an irregular description of a qualification by reason of the occupation of a house, i.e., as a description of a dwelling-house, then it seems to me that, although it was an irregular description, he might amend it.

The case, therefore, depends upon what is the true construction, or what might be a fair construction, of the entry. Now, as it seems to me, you must take the whole entry together in order to come to a conclusion about it, and you must look at the circumstances. It appears that the appellant in this court, James Ayles, did occupy as a dwelling part of a house which was in reality a bailiff's house. I do not know the circumstances, but I suppose he is employed upon an estate where there is a bailiff, and that he was occupying a separate room in what is called the bailiff's house. That was the fact. Then, as it seems to me, you may read this entry subject to your knowledge of these facts; and if so, what does it say? "Tenement and garden, part of bailiff's tenement." What did the people mean who wrote that down? It seems to me that they meant to use the word "tenement," both in the third and the fourth columns, according to a vulgar, that is, an ordinary mode of speaking

(1) Ante, p. 279.

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among some classes of people, in the sense of a small house. If that be so, if the barrister was entitled to read "tenement and garden, part of bailiff's tenement," as meaning a house and garden, the house being part of a bailiff's house, then, although it is an improper description, it is a description of that qualification of which he has finally given a correct description, and, if so, he was entitled to make the amendment. I think that, knowing what we do of the ordinary modes of speaking in a certain class of life, it was open to him to come to the conclusion of fact, that the word "tenement" both in the third and in the fourth columns was intended to mean the occupation of a part of a house, and would let the objector know this if he considered the matter carefully. It is an irregular description, for the term is one which is common in ordinary language both to the qualification by reason of inhabiting a dwelling-house and the qualification by reason of occupancy other than that of a dwelling-house. But I do not think that prevented the revising barrister from amending the description, if he thought that, as between the objector and the voter, it might fairly mean that the claim was in respect of the occupation of part of a house.

That being so, I think we cannot say that the revising barrister was wrong; he was entitled to make the amendment, and, if he was entitled to do so, there is nothing to shew us that he exercised his power wrongly. I cannot compliment him on the way in which he has made the amendment; I think he ought to have struck out the words "tenement and garden" altogether, and to have inserted the word "dwelling-house." But I think he had authority, jurisdiction, and power to make the amendment, and that is the question before us. I do not consider that we are really overruling the decision of the Divisional Court, because, without having the case argued out, they sent it up to us in order that we might consider whether the amendment did involve an alteration of the qualification.

COTTON, L.J. I think that the revising barrister had power to amend this list by inserting, as in substance, though not in terms, he has done, the word "dwelling-house," instead of "tenement and garden." Under sub-s. 13 of s. 28 he had power to alter the description of the qualification, "for the purpose of more clearly

and accurately defining the same," but he had no power to do it except for that purpose. Is that what he has done? The expression used was "tenement and garden." Now may not the words "tenement and garden" fairly and properly be considered as describing, though not clearly and accurately describing, a dwelling-house? In my opinion they may. There are two franchises in counties. There is what is called a dwelling-house franchise, the inhabiting of a dwelling-house, and there is the franchise arising from the occupation of land or tenements of a certain annual value.

Now what is the meaning of the word "tenement?" Of course in strictness it means anything which is capable of being held. But I have referred to Blackstone's Commentaries, and I find that he says, "Tenement is a word of still greater extent, and though in its vulgar acceptation it is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies everything that may be holden, provided it be of a permanent nature." I think the vulgar meaning of the word which existed in Blackstone's days still remains, and that common people, not lawyers, use the word "tenement" when they mean to speak of a dwelling-house or building of that character. In my opinion, having regard to the different franchises, the list ought clearly and accurately to define which qualification is intended. But, when we find that the word "tenement" is in its vulgar sense used as signifying a dwelling-house, I think it would be going too far to say that the alteration of that word to "dwelling-house" is the introducing of a new and other qualification, rather than clearly and accurately defining the qualification in respect of which the claimant desires to be placed on the register. In my opinion the amendment was properly made, though I agree with the Master of the Rolls as to the form in which it should have been made.

BOWEN, L.J. I am of the same opinion.

Appeal allowed.

Solicitors for appellant: *Field, Roscoe, & Co.*
Solicitors for respondent: *Gregory, Rowcliffes, & Co.*

W. L. C.

1885
Nov. 6.

[IN THE COURT OF APPEAL.]

MINIFIE, APPELLANT; BANGER, RESPONDENT.

Parliament—County Vote—Registration of Voters—Description of Qualification—Power to amend—"Tenement"—41 & 42 *Vict. c.* 26, *s.* 28.

In the overseers' list of occupiers entitled to vote for a division of a county, the "nature of the qualification" of a voter was described as "tenement and garden," and the "description of the qualifying property" was stated to be "School Yard." The "nature of the qualification" of thirty-three other voters was described in the same way. As to two of the thirty-three the "description of the qualifying property" was stated to be "School Yard," as to five, "Cat Lane," as to three, "High Street," as to five, "Bridge." In each case the voter occupied a dwelling-house and garden of a less annual value than 10*l.*:—

Held, by the Court of Appeal, that, looking at all the cases together, the revising barrister might fairly consider that the words "tenement and garden" were intended to describe a dwelling-house, and that he had power to amend the description by striking out the words "and garden," and inserting the word "dwelling-house" before "tenement," though it would have been better to strike out "tenement" also.

APPEAL from the Queen's Bench Division, reversing a decision of the revising barrister for the Northern Division of the county of Dorset, to amend some entries in the occupiers' list of voters for the parish of Stourton Caundle, as published by the overseers.

The name of Isaac Banger was thus entered in the list:—

Name of Voter in full, Surname being first.	Place of Abode.	Nature of Qualification.	Description of qualifying Property.
Banger, Isaac.	Stourton Caundle.	Tenement and garden.	School Yard.

Banger occupied only a dwelling-house and garden in the parish, of the annual value of less than 10*l.* C. J. Minifie served Banger with a notice of objection, alleging that the nature of his qualification was wrongly described. The names of thirty-three other persons were objected to by Minifie under similar circumstances. The names and qualifications of these persons, as they

appeared in the list published by the overseers, were set out in a schedule to the case stated by the barrister. It was proved to him that the entry arose wholly through a mistake of the overseers, and the barrister decided that he had power, under s. 28 of the Act 41 & 42 Vict. c. 26, or otherwise, to expunge the words "and garden" from the third column, and to prefix the words "dwelling-house," and he accordingly made this alteration in the third column in the case of Banger and the other thirty-three persons, and retained all the names in the list. Notice of appeal was given by Minifie, and all the thirty-four cases were consolidated.

The Divisional Court (Lord Coleridge, C.J., and Grove and Cave, JJ.) held that there was no power to amend, and they reversed the decision of the barrister.

The voters appealed.

In two of the thirty-three cases set out in the schedule the entry in the fourth column was "School Yard," in five the entry in the fourth column was "Cat Lane," in three "High Street," in five "Bridge," and so on. In each of the thirty-three cases the entry in the third column was "tenement and garden."

Crump, Q.C., for the voters. The term "School Yard" may well be a description of locality, and the words "tenement and garden" may fairly be read as meaning a dwelling-house situated in a place called "School Yard." In *Bartlett* v. *Gibbs* (1) Tindal, C.J., said (at p. 96): "We think that the legislature intended that the registration list should afford such information of the nature and situation of the premises, in respect of the occupation of which each person claimed a right to vote, as would enable the other voters to ascertain by inquiry the sufficiency of the occupation and value of each of the premises." That information was given in the present case. There was power to make the amendment.

J. A. Foote, for the objector. The words "School Yard" afford no assistance in determining whether the occupation is of a shop, or an office, or a dwelling-house. In this respect the case differs from *Dashwood* v. *Ayles*. (2) There is nothing to give a

(1) 5 Man. & G. 81. (2) Ante, p. 295.

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hint to the objector that the claim is in respect of residence, and not of mere occupation.

LORD ESHER, M.R. From what I am about to say, it must not be taken that we are of opinion that whenever the word "tenement" is used in the third column of the list it can be amended. But, in the present case, looking at the third column, and the fourth, not only in the particular case of Isaac Banger, but in the other cases in the schedule, I think we cannot say that the revising barrister might not reasonably and fairly, as between the objector and the voter, have come to the conclusion that the words "tenement and garden" in the third column meant a dwelling-house and garden, and therefore he was entitled to make the amendment which he did make. This is, no doubt, taking a very large view, but I repeat distinctly that our decision in this case is not to be considered as importing, that we think that in every case in which the word "tenement" is used in the third column it can be amended.

COTTON, L.J., and BOWEN, L.J., concurred.

LORD ESHER, M.R. We think that the case is so stated that it almost invited an appeal, and therefore there ought to be no costs on either side, either in this Court or in the Court below.

Appeal allowed.

Solicitors for appellant: *Field, Roscoe, & Co.*

Solicitors for respondent: *Gregory, Rowcliffes, & Co.*

W. L. C.

[IN THE COURT OF APPEAL.]

1885
Oct. 30.

EX PARTE FORD. IN RE CHAPPELL.

Bankruptcy—Proof—Postponement of Charge at Request of Bankrupt—Implied Promise to indemnify.

In order to enable a mortgagor to obtain a further advance from the first mortgagee on the security of the mortgaged property, the second mortgagee agreed to postpone his charge to a then existing third charge in favour of the first mortgagee, and to the fresh advance. The mortgagor became bankrupt, and, when the property was afterwards sold by the first mortgagee, the proceeds of sale were insufficient to pay the whole amount due to him, though they exceeded the amount of the first mortgage:—

Held, that the second mortgagee was entitled to prove in the bankruptcy for the amount which he would have received out of the proceeds of sale if he had not consented to postpone his charge, on the ground that the Court was entitled to infer an implied promise by the bankrupt to indemnify the second mortgagee against any loss which might result from the postponement of his charge.

APPEAL by the trustee in the bankruptcy of T. D. Chappell against an order of a Divisional Court of the Queen's Bench Division (Cave and Smith, JJ.), sitting in bankruptcy, admitting a proof tendered against the estate of the bankrupt by Dr. J. J. Chappell, a brother of the bankrupt.

Prior to the 21st of November, 1879, the bankrupt was entitled in fee to an estate at Axminster, subject (1) to several mortgages in favour of Henry Hughes for sums amounting to 6000*l.*; (2) to a charge for 2000*l.* in favour of Dr. Chappell; (3) to another charge for 2000*l.* in favour of Hughes. The bankrupt desired to borrow a further sum of 1500*l.* from Hughes on the security of the property, and Hughes declined to lend it unless Dr. Chappell would consent to postpone his charge. This he, at the request of the bankrupt, consented to do. A mortgage deed, dated the 21st of November, 1879, was accordingly executed, by which the property was charged with the payment of a further sum of 1500*l.* in favour of Hughes, in priority to the charge of 2000*l.* in favour of Dr. Chappell, and priority over Dr. Chappell's charge was also given to the charge for 2000*l.* in favour of Hughes. And Dr. Chappell by this deed assigned his charge for 2000*l.* to a trustee, on trust for Hughes, by way of further security for the 1500*l.* advanced by him, and for his prior mortgage debt of 8000*l.* This

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deed did not contain any covenant by the bankrupt to indemnify Dr. Chappell against any loss which he might sustain in consequence of the postponement of his charge. In 1884 T. D. Chappell became bankrupt. The mortgaged property was afterwards sold by Hughes, under a power of sale contained in his mortgage, and it produced only 8400*l.* An arrear of interest amounting to 592*l.* 9*s.* 4*d.* was also due to Hughes, and a sum of 550*l.* charged on some other property belonging to the bankrupt. In this way the total sum due to him amounted to 10,642*l.* 9*s.* 4*d.*, and after deducting 8400*l.*, the proceeds of sale of the Axminster property, the balance remaining due to Hughes was 2242*l.* 9*s.* 4*d.* For this sum, less 400*l.*, the estimated value of the other property charged with the 550*l.*, Hughes claimed to prove in the bankruptcy. Dr. Chappell tendered a proof in the bankruptcy for 3363*l.*, the amount of his charge for 2000*l.*, together with interest thereon prior to the date of the receiving order. The trustee rejected the proof, and the judge of the Exeter County Court affirmed the rejection. The Divisional Court discharged the order of the County Court, and gave Dr. Chappell liberty to carry in a fresh proof upon the following principle—viz., that he was entitled to prove for the loss which had accrued to him by reason of his not having received the amount which he would have received out of the proceeds of the sale of the mortgaged property if he had not been a party to the deed of the 27th November, 1879, and the Court declared that the amount of that loss was the balance of the proceeds of sale, after deducting therefrom the mortgage debt of 6000*l.* and interest due thereon at the date of the completion of the sale, it appearing to the Court that such balance would be less than 2000*l.*, the amount of Dr. Chappell's charge on the property.

Cooper-Willis, Q.C., and *Simonds*, for the trustee. Dr. Chappell only agreed to postpone his charge; he did not undertake any personal liability on behalf of his brother. In such a case no promise can be implied on the part of the brother to pay the amount of Dr. Chappell's charge, in case it should be lost by reason of the postponement. In the absence of any express promise to that effect, contained either in the deed or in some other written instrument, the proof ought not to be admitted.

A. Charles, Q.C., and *Yate Lee*, for Dr. Chappell. If Dr. Chappell had paid a sum of money at his brother's request, there can be no doubt that a promise to indemnify him would have been implied. The same principle applies to the present case. It can make no difference in principle whether a man pays the debt of another by sovereigns out of his purse, or gives him a charge on land for the debt.

[LORD ESHER, M.R. No debt would arise till the sale of the property, and that was after the bankruptcy.]

There was at the commencement of the bankruptcy a contingent liability, though the amount of it was not ascertained till afterwards.

LORD ESHER, M.R. It seems to me that whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted. When, in the present case, one brother at the request of the other gave up and postponed a right which he had, from which postponement it was very probable that a loss might result to him, it seems to me that ordinary people would have intended that the brother, for whose benefit the postponement was made, should promise to indemnify the other against any resulting loss. I think there is evidence from which the proper tribunal might infer that such a promise was given. The proper tribunal has drawn that inference, and I see no reason for interfering with their conclusion.

COTTON, L.J. I am of the same opinion. The point is a nice one. The brother, at the request of the bankrupt, agreed to deal with his security in such a way that it became liable to be defeated. I do not see that there is any evidence that Dr. Chappell intended to make a present of his security to his brother; I think, therefore, that the proper inference to draw is, that it was intended that he should be indemnified by his brother in case any loss should result to him.

LINDLEY, L.J. I am of the same opinion. No doubt there is at first sight a little difficulty in the case. But, in substance,

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Ex parte Ford. In re Chappell.

Dr. Chappell's interest in the property has been applied in paying his brother's debt, and it seems to me that there is good ground for inferring a promise on the part of his brother to indemnify him. It is said that this promise ought not to be implied, because the deed which was executed at the time contains no provision for indemnity. But that deed was executed for a limited purpose, viz., the postponement of Dr. Chappell's security, and it appears to me quite consistent with the deed that a promise to indemnify him should be implied.

Appeal dismissed.

Solicitors for trustee: *J. E. Fox & Co.*

Solicitors for respondent: *S. D. Hamilton, for W. Friend, Exeter.*

W. L. C.

Oct. 30.

[IN THE COURT OF APPEAL.]

Ex parte SIMMONDS. In re CARNAC.

Bankruptcy—Trustee in Bankruptcy—Payment of Money under Mistake of Law—Right of Payer to recover.

The ordinary rule as between litigant parties, that money paid under a mistake of law cannot be recovered, does not apply to a payment made under such a mistake to the trustee in a bankruptcy.

The trustee being an officer of the Court, the Court, when the mistake is discovered, will direct him to refund the money, if it is still in his hands; and, if it has been applied in the payment of dividends to the creditors under the bankruptcy, the Court will direct the trustee to repay it out of other moneys coming to his hands, and applicable to the payment of dividends to the creditors.

Ex parte James (Law Rep. 9 Ch. 609) followed and extended.

Appeal by the trustee in the liquidation of Sir John Rivett Carnac against an order of Mr. Registrar Murray, that the trustee should, out of the debtor's estate, repay to G. E. Seymour, the surviving trustee of the settlement made on the marriage of Sir J. R. Carnac, a sum of 569*l.* 2*s.* 2*d.*, which J. W. Ede, a deceased trustee of the settlement, had paid to the trustee in the liquidation.

By the settlement, dated the 30th of November, 1840, a sum of 5000*l.* was vested in Ede and Seymour, upon trust to invest the same in Government or real securities, and to pay the income

thereof to Sir John for his life, and after his death to his wife for her life, and, after the death of the survivor of them, the trust fund was to be held in trust for the children and other issue of the marriage. The 5000*l.* was invested in the purchase of a sum of 5446*l.* 2*s.* 11*d.* consols, in the names of the two trustees. In the year 1857, at the request of Sir John, the consols were sold by the trustees, and part of the proceeds of sale were invested in the purchase of 2200*l.* guaranteed 4 per cent. stock of the North Eastern Railway Company (a security not authorized by the settlement) and the residue, amounting to 3000*l.*, was advanced to Sir John. This was done upon the terms of an agreement, a memorandum of which was contained in an account book kept by Ede, who was the acting trustee of the settlement.

This memorandum was as follows:—

"Sir John and Lady R. Carnac's Trust Fund.

"5446*l.* 2*s.* 11*d.* consols were, at the request of Sir John and Lady Carnac, sold by John W. Ede and George Edward Seymour, the trustees.

"Out of the proceeds 3000*l.* were advanced to Sir John Carnac, on the security of his bond, at 4 per cent. per annum. His life policy for 3200*l.* in the London Life Office was also assigned to the trustees as additional security. The balance was invested in the purchase of 2200*l.* North Eastern Railway guaranteed 4 per cent. stock.

"The dividend usually received by Sir J. Carnac on 5446*l.* 2*s.* 11*d.* consols, being 81*l.* 13*s.* 10. half-yearly, less income tax, to be paid him as before, and the balance invested and added to the capital for the benefit of his children, on the same trusts as the 5446*l.* 2*s.* 11*d.* consols were held.

"The trustees can sell the guaranteed stock at any time, and invest the proceeds in other railway guaranteed or preference stock, or in Government securities.

"When 400*l.* of such stock shall have been added, the interest on the bond for 3000*l.* to be reduced to 4 per cent. per annum.

"Dated the 15th of April, 1857,

"We agree to the above

"(Signed) J. R. Carnac,

"Anne Rivett Carnac."

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Ex parte Simmonds. In re Carnac.

This arrangement was carried out until, in 1875, Sir John filed a liquidation petition. During that period of eighteen years Sir John paid the premiums on the policy, and Ede paid to him half-yearly the difference between the dividend, to which he would have been entitled if the consols had not been sold, and the interest on the 3000*l.*, which he was bound to pay under the agreement. The surplus income of the railway stock was accumulated and invested as provided by the agreement.

After the commencement of the liquidation, Sir John failed to pay the premiums on the policy, and Ede paid them out of the income which he received as trustee, and, in consequence of a notice served on him by the trustee in the liquidation, he, from 1875 down to 1883, paid the whole of the surplus of the income which he received to the trustee. The sums thus paid amounted to 861*l.* 6*s.* 8*d.* In 1883, Sir John died, and the 3000*l.* was repaid to the trustees of the settlement out of the proceeds of the policy.

The trustees of the settlement were afterwards advised that they had been wrong in making these payments to the trustee in the liquidation, and they, in April, 1884, applied to the Court of Bankruptcy for an order that the trustee in the liquidation should, out of any assets then in his hands, not disturbing any dividends already declared, or out of the first assets thereafter to come to his hands, repay to the trustees of the settlement the sum of 861*l.* 6*s.* 8*d.* Upon this application (Ede having meanwhile died) the registrar made the order appealed from. The sum of 569*l.* 2*s.* 2*d.* represented the amount of the payments made by Ede to the trustee in the liquidation within six years before the date of the notice of the application to the Court.

The trustee in the liquidation deposed that the whole of the moneys paid to him by Ede, except the sum of 56*l.* (retained on account of the expenses of the liquidation) had been distributed in dividends amongst the creditors of Sir J. R. Carnac.

Cooper Willis, Q.C., and *Alexander*, for the appellant, the trustee in the liquidation. Assuming that Ede made the payments to the appellant under a mistake as to the true legal effect of the memorandum of the 15th of April, 1857, there is no right to

repayment of the moneys thus paid. A trustee who has overpaid his cestui que trust may be entitled to recoup himself out of other moneys of the cestui que trust which come to his hands, but there is no implied contract for repayment. The payments were made by Ede with full knowledge of the facts, and money paid under a mistake of law cannot be recovered.

J. G. Wood, for the respondent, the trustee of the settlement. On the true construction of the memorandum the payments to the appellant were clearly made in error, and the respondent is entitled to recover them out of the assets available for the payment of dividends to the creditors in the liquidation. Personal payment by the appellant is not asked for. Money has been paid to the liquidating debtor's estate which does not belong to it, and the dividend paid to the creditors has been thus increased. The money really belonged to the debtor's children, and the settlement trustee is entitled to follow the trust money. The ordinary rule as between adverse litigants, that money paid under a mistake of law cannot be recovered, does not apply to a trustee in bankruptcy. He is an officer of the Court, and the Court will direct him to do that which is morally right: *Ex parte James.* (1)

Cooper Willis, Q.C., in reply. In *Ex parte James* (1) the money which had been paid in error to the trustee in a bankruptcy was still in his hands; it had not been distributed among the creditors as in the present case. The money could be ear-marked; in the present case it cannot. A Court of Equity will not in every case relieve against a payment of money under a mistake of law: *Rogers* v. *Ingham.* (2)

After the officer of the Court has, in accordance with his duty, distributed money in his hands, he is under no obligation to repay it; there is no lien on moneys which afterwards come into his hands.

LORD ESHER, M.R. (after stating the facts), continued:—The demand made by the trustee in the liquidation upon the trustee of the settlement was wrong in point of law, but the trustee of the settlement acceded to it. The money was paid erroneously; they were both in error in point of law. It is immaterial whether the

(1) Law Rep. 9 Ch. 609. (2) 3 Ch. D. 351.

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EX PARTE SIMMONDS. IN RE CARNAC.

liquidation trustee knew of the agreement of April, 1857; the settlement trustee did; it was in his own handwriting, and he had acted upon it for years. The question is, what ought the Court to do when the mistake is discovered? When I find that a proposition has been laid down by a Court of Equity or by the Court of Bankruptcy which strikes me as a good, a righteous, and a wholesome one, I eagerly desire to adopt it. Such a proposition was laid down by James, L.J., in *Ex parte James.* (1) A rule has been adopted by Courts of law for the purpose of putting an end to litigation, that, if one litigant party has obtained money from the other erroneously, under a mistake of law, the party who has paid it cannot afterwards recover it. But the Court has never intimated that it is a high-minded thing to keep money obtained in this way; the Court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order that is, to put an end to litigation. But James, L.J., laid it down in *Ex parte James* (1) that, although the Court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law. This rule is not confined to the Court of Bankruptcy. If money had by a mistake of law come into the hands of an officer of a Court of Common Law, the Court would order him to repay it so soon as the mistake was discovered. Of course, as between litigant parties, even a Court of Equity would not prevent a litigant from doing a shabby thing. But I cannot help thinking that, if money had come into the hands of a receiver appointed by a Court of Equity through a mistake of law, the Court would, when the mistake was discovered, order him to repay it. A trustee in bankruptcy has always been treated as an officer of the Court of Bankruptcy, and the Court will order him to act in an honourable and high-minded way, and so it was laid down by James and Mellish, L.JJ., in *Ex parte James.* (1) It is true that in that case the money in question had not been divided among the creditors, but was still in the hands of the trustee, and we are about to carry the principle of this decision somewhat further. But, though the money has been divided

(1) Law Rep. 9 Ch. 609.

among the creditors, the Court sees that other moneys, which would be applicable to the payment of dividends to the creditors, are about to come into the hands of the trustee, and it has not been shewn that any injury will be done to any one by ordering the trustee to apply this money which is coming to him to replace the other money which was paid to him in error, and I think it is right that it should be so applied. In my opinion, the Registrar's order was right, and the appeal must be dismissed.

Cotton, L.J. The first question is, whether the payments made to the trustee in the liquidation were erroneous in point of law, and, in my opinion they were. Can the money thus wrongly paid be now recovered from the trustee? Undoubtedly it cannot be recovered from him personally, but that is not the order which has been made. The order is that the trustee do repay the amount out of moneys which it is assumed are or will be in his hands, i.e., moneys available for the payment of dividends to the creditors. In my opinion it would be wrong to interfere with any right of the trustee to be paid his costs and expenses incurred in the liquidation, and the registrar's order must be taken to mean that the repayment is to be made out of moneys available for the payment of dividends. Ought it then to be made out of these moneys? The trustee relies on the ordinary rule, that money paid under a mistake of law cannot be recovered in an action between litigant parties. That no doubt is so. But the present case stands in quite a different position. The trustee in the liquidation has, or will have, funds in his hands, and the question is, how ought they to be applied? It is said that they ought to be applied in paying dividends to the creditors. Of course they ought, unless there is some prior claim to them. It cannot be said that there is any lien upon the moneys in the trustee's hands in respect of the sum which was paid to him by mistake. But the funds applicable to the payment of dividends to the creditors have been erroneously increased by means of that payment to the trustee, and the question is whether the sum thus paid in error ought not to be repaid out of those funds. In my opinion *Ex parte James* (1) lays down this proposition, that when the officer of the Court has in his

(1) Law Rep. 9 Ch. 609.

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EX PARTE SIMMONDS. IN RE CARNAC.

hands a sum of money which has been paid to him erroneously under a mistake of law, the ordinary rule as between adverse litigants does not apply, but he will be ordered to repay it. It has been urged, and rightly urged, that in *Ex parte James* (1) the money was still in the hands of the trustee, whereas in the present case the money has been distributed among the creditors, and that our decision will be a development of the principle of *Ex parte James.* (1) But, in my opinion, we must regard the funds available for distribution among the creditors under a bankruptcy or liquidation as one entire fund, and, if that fund has been erroneously increased, I think it is a just extension of *Ex parte James* (1) to say that, out of any moneys which may hereafter be in the hands of the trustee and applicable to the payment of dividends to the creditors, the amount which has come into his hand by mistake ought to be repaid. If the trustee desires it the registrar's order may be qualified by saying, that the repayment is to be made out of any moneys which may now or hereafter be in the hands of the trustee and applicable to the payment of dividends.

LINDLEY, L.J. I think that the mistake of law is established, and the question is, whether it can be put right now? If it can, it certainly ought to be put right. I think it can. The Court by means of its officer has made a mistake, and has given to the creditors money which they ought not to have had. It would, I think, be unjust to make the creditors refund what they have thus received. But what is there unjust in saying, that no more money shall go to them until this sum has been repaid to its rightful owner? It appears to me there will be no injustice in giving such a direction to the trustee. *Ex parte James* (1) is an authority for doing so, but, even without that authority, I should have thought that the injustice which has been inadvertently done could be set right.

Appeal dismissed.

Solicitors for appellant: *Emmanuel & Simmonds.*
Solicitors for respondent: *A. F. & R. W. Tweedie.*

(1) Law Rep. 9 Ch. 609.

W. L. C.

[IN THE COURT OF APPEAL.]

1885
Nov. 7.

EX PARTE LENNOX. IN RE LENNOX.

Bankruptcy — Application for Receiving Order—Judgment Debt—Power of Court to inquire into Consideration for Debt — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7 (3)—"*Judge's order made by consent*"—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 27.

The Court of Bankruptcy has power to go behind a judgment and inquire into the consideration for the judgment debt, not only at the instance of the trustee in the bankruptcy of the debtor upon the question of the proof of the debt, but also at the instance of the judgment debtor himself upon the hearing of a petition by the judgment creditor for a receiving order, even though the debtor has consented to the judgment; and, if on the hearing of the petition facts are alleged by the debtor, of which evidence is tendered, and which, if proved, would shew that, notwithstanding the judgment, there is, by reason of fraud or otherwise, no real debt, the Court ought not to make a receiving order without first inquiring into the truth of the debtor's allegations.

Ex parte Kibble (Law Rep. 10 Ch. 373) discussed and followed.

An order made by consent at the trial of an action on a promissory note, that the statement of defence and the pleadings be withdrawn, and that the defendant do pay to the plaintiff a specified sum and taxed costs :—

Held, not to be a "judge's order made by consent" within s. 27 of the Debtors Act, 1869.

APPEAL from a receiving order made by Mr. Registrar Hazlitt against the appellant, Lord Henry Gordon Lennox, on the petition of C. F. Emmott.

On the 29th of August, 1884, Emmott commenced an action against the appellant in the Queen's Bench Division. The writ was specially indorsed with a claim against the defendant as the maker of two promissory notes, for 1000*l.* and 500*l.* respectively, dated the 30th of April, 1883, and payable to H. Williamson, or his order, twelve months after date, and indorsed by him to the plaintiff. The plaintiff claimed 1500*l.*, with interest, and costs. Leave was given to the defendant to defend the action, and by his statement of defence he made (inter alia) the following allegations :—

"There never was any value or consideration for the making or paying of the said notes, or either of them, by the defendant, nor were they made for the purpose hereinafter mentioned, as the

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plaintiff always knew. The plaintiff requested the said H. Williamson to indorse and hand over the said notes to him, in order that he (the plaintiff) might make use of the same for his (the plaintiff's) benefit and advantage, upon the express agreement and understanding, then verbally made and entered into by the plaintiff, that such use should be only temporary, and that he (the plaintiff) should retire and take up the notes and the defendant should not be called upon to pay the same, and the plaintiff thereby induced the said H. Williamson to indorse and hand over the said notes to him for the purpose aforesaid, on the faith of such agreement and understanding, and not otherwise. There was no value or consideration for the indorsement of the said notes or either of them to the plaintiff; and he has always held the same without any value or consideration, and is bringing this action in breach of his said agreement and undertaking. The plaintiff, either in partnership with the said H. Williamson or otherwise, was engaged in acquiring and running horses in races, and in betting, and other transactions and enterprises on the turf, and any moneys which the said H. Williamson may have received from the plaintiff were so received for the purpose of being expended or employed by the said H. Williamson in and about the matters aforesaid, or otherwise for the plaintiff and on his behalf, as his partner and agent, and were so applied. If there was any consideration for the indorsement by the said H. Williamson of the said notes, or either of them, to the plaintiff (which is denied), the same did not move from the plaintiff, and he was a stranger to such consideration."

The plaintiff, by his reply, joined issue with the defendant on the defence, and also asserted that he, on the 8th of March, 1883, paid 1400*l.* as consideration for the notes to Williamson, who indorsed the notes to the plaintiff, and that the payment was made bonâ fide and without any notice of the facts alleged in the defence.

When the action came on for trial, on the 3rd of June, 1885, the defendant withdrew his defence, and the following order was made:—"At a sitting held at the Royal Courts of Justice on the 3rd of June, 1885, before the Hon. Mr. Justice Cave, by consent it is ordered that the statement of defence and the pleadings herein be withdrawn, and that the defendant do pay to the plain-

tiff the sum of 1600*l.* and taxed costs. The defendant to have a month in which to pay the said amount."

The defendant failed to make the payment within the month, and on the 25th of July, 1885, Emmott served him with a bankruptcy notice, founded on the order of the 3rd of June, which the notice described as a final judgment. The defendant failed to comply with the notice, and on the 6th of August, Emmott presented a bankruptcy petition against him, founded on the judgment debt and the omission to comply with the bankruptcy notice.

The defendant gave notice to dispute the petitioning creditor's debt on (inter alia) the above grounds mentioned in the statement of defence, in support of which an affidavit made by Williamson was tendered. At the hearing of the petition, Emmott was cross-examined on behalf of the debtor, and the debtor's counsel proposed to ask him questions with the view of establishing the truth of the allegations contained in the notice to dispute, and of shewing that, notwithstanding the order of the 3rd of June, no debt was really due by the judgment debtor to Emmott. The Registrar held that, after what had taken place, the debtor was not entitled to go behind that order, and his Honour made a receiving order. The debtor himself was not present at the hearing.

The debtor appealed.

Winslow, Q.C., and *A. A. Terrell*, for the appellant. It is clear that, if what the appellant alleges is true, there was no consideration for the judgment; there was no real debt. The power of the Court of Bankruptcy to go behind a judgment, and inquire into the validity of the judgment debt, has been long established. There are numerous cases in which this has been done at the instance of the assignee or trustee in a bankruptcy on a question of proof of debt: *Ex parte Bryant* (1); *Ex parte Marston* (2); *Ex parte Butterfill* (3); *Ex parte Prescott* (4); *Ex parte Banner.* (5) And, on principle, the Court must have the same power to inquire

(1) 1 V. & B. 211.
(2) 3 Mont. & A. 444.
(3) 1 Rose, 192.
(4) 1 M. D. & De G. 199.
(5) 17 Ch. D. 480.

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into a judgment debt at the instance of the judgment debtor himself, when the question is whether a receiving order or an adjudication ought to be made against him in respect of the judgment debt. The petitioning creditor is asking, in effect, for the division of the debtor's property rateably between himself, and the other creditors. If he has no interest whatever in the estate;—if, supposing an adjudication were made, he would not be admitted to prove his debt, and could have no share of the assets,—how can he be entitled to an order the only object of which is to obtain the division of the estate, contrary, it may be, to the wishes of all the other creditors? And *Ex parte Kibble* (1) is a distinct decision of the Court of Appeal that the Court of Bankruptcy can, at the instance of the debtor himself, inquire into the validity of a judgment debt when deciding whether an adjudication of bankruptcy ought to be made against the debtor. It is true that in that case the judgment had been obtained by default, but that makes no difference, the principle being the interest of the other creditors. "The object of the bankruptcy laws," as James, L.J., said, in *Ex parte Kibble* (2), "is to procure the distribution of a debtor's goods among his just creditors." Some of the observations made by the judges in *Ex parte Ritso* (3) tend to confirm the decision in *Ex parte Kibble.* (2) Sect. 7 (3) of the Bankruptcy Act, 1883, gives the Court a discretion as to the making of a receiving order.

Another objection to the debt is that the consent order is "a judge's order made by consent, given by a defendant in a personal action, whereby the plaintiff is authorized forthwith or at any future time to sign or enter up judgment, or to issue or take out execution," within the meaning of s. 27 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), and, therefore, any execution issued on the judgment would be void, because the order was not filed within twenty-one days, as required by the section: *Bryan* v. *Child.* (4)

[LORD ESHER, M.R. I do not think the order is within s. 27.

LINDLEY, L.J. It is not one of the orders specified in that section.]

(1) Law Rep. 10 Ch. 373.
(2) Law Rep. 10 Ch. at p. 376.
(3) 22 Ch. D. 529.
(4) 19 L. J. (Ex.) 264.

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R. Vaughan Williams, for the petitioning creditor.

[LORD ESHER, M.R. You need not deal with the second point.]

A debtor is not entitled in every case to ask the Court of Bankruptcy to go behind a judgment when the creditor is applying for a receiving order or an adjudication in respect of the debt. In some cases the Court will, at the instance of the judgment debtor himself, go behind a judgment, but it will not in all. The Court, no doubt, did this in *Ex parte Kibble*. (1) But, primâ facie, a judgment is sufficient evidence of the existence of a debt and imports consideration. The Court will not go behind it, unless it is shewn that the judgment was obtained by collusion or by fraud on the part of the judgment creditor. The Court will not go behind a judgment when the defendant has pleaded fraud in his defence, and then at the trial, in the presence of the Court, has withdrawn his defence and consented to an order being made against him. This shews that the defence had no foundation. Even as against the other creditors a judgment is primâ facie evidence of a debt: *Ex parte Anderson*. (2) There is a great distinction between an application by the trustee on behalf of the other creditors and an application by the debtor himself: *Ex parte Banner*. (3) At the instance of the debtor himself the Court of Bankruptcy will not go behind a judgment unless the circumstances were such as would have induced a Court of Equity on equitable grounds to restrain the creditor from enforcing it in the absence of any bankruptcy proceedings: *Ex parte Mudie*. (4) In *Ex parte Prescott* (5) the application was for an annulment of an adjudication. In the present case the postponement of payment for a month was consideration for the consent order; after that, how can the debtor be allowed to say that there was no consideration for the debt? It is said that it would be absurd to allow a creditor to obtain a receiving order or an adjudication, when his proof for the debt on which his petition is founded might afterwards be rejected. But a receiving order or an adjudication is made for the benefit of all the creditors. The ground

(1) Law Rep. 10 Ch. 373.
(2) 14 Q. B. D. 606.
(3) 17 Ch. D. 480, 491.
(4) 3 M. D. & De G. 66, 73.
(5) 1 M. D. & De G. 199.

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of the decision in *Ex parte Kibble* (1) was, that the debt for which the judgment had been obtained was absolutely void under the Infants Relief Act. That decision was founded on public policy. *Ex parte Kibble* (1) is not a decision that, without any special circumstances, the Court will, at the instance of the debtor, go behind a judgment. In the present case the judgment was not a sham; there was a real fight between the parties.

As to s. 7 (3), the Court of Bankruptcy has in every case a discretion with regard to its process; no one has an absolute right to invoke its aid. But certain rules have been laid down as to the exercise of the discretion.

[COTTON, L.J., referred to *Ex parte Griffin.* (2)]

Winslow, Q.C., in reply. The point is really decided by *Ex parte Kibble.* (1) The appellant is ready to make an affidavit that he consented to the order in the action, because he wished to avoid the publicity of a trial. In the old forms of proof on a judgment debt the consideration for the debt was always stated.

LORD ESHER, M.R. In this case the authority and power of the Court of Bankruptcy was vouched by a judgment creditor to make a receiving order against his judgment debtor, the effect of which might be that the judgment debtor would become a bankrupt. The power of the Court of Bankruptcy to make such an order is given to it by s. 7 of the Bankruptcy Act, 1883. It was admitted on both sides that a judgment had been obtained by the alleged creditor against the debtor, but it was suggested on behalf of the debtor that the Registrar ought not to make a receiving order, because although there was a judgment, yet the debtor could shew that the alleged debt, in respect of which the judgment had been obtained, never really existed—that that which had been assumed to be a debt was founded on a fraud, which fraud could be brought home to the creditor, so that, neither at law nor in equity, ought he to be allowed to call it a debt at all. The Registrar, although evidence was tendered to him to that effect, was of opinion that, because there was a judgment, and because the application was made at that stage of the proceedings by the debtor himself, he could not, whatever were

(1) Law Rep. 10 Ch. 373. (2) 12 Ch. D. 480.

the circumstances relating to the original debt, inquire into them, or go behind the judgment. The first question is, whether the Registrar's view is right, and then, if it is not, whether, under the circumstances, the inquiry ought to be made.

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Now, the authority of the Court, as I have already said, depends upon s. 7 of the Act, sub-s. 3 of which limits the authority in this way: "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition." Now, what proof is offered of the petitioning creditor's debt? No doubt there is the judgment. But, if the Court is not satisfied with that proof, which is the proof offered to it, "the Court may dismiss the petition." Then again, "if the Court is satisfied that for other sufficient cause no order ought to be made, the Court may dismiss the petition." It is argued that, notwithstanding these words, the Court at this stage of the proceedings ought to be and must be satisfied with the proof of the debt, if it is founded on a judgment obtained by consent. It was admitted that, if the judgment had gone by default, the Court might not, perhaps, under those circumstances, be satisfied with the judgment as proof. But it was strongly urged that where the judgment had been obtained by the consent of the alleged debtor, the Court must be satisfied with the proof.

It seems to me that the question is, not so much what is the right of the debtor, or what the conduct of the debtor or of the creditor has been, but rather whether the Court ought to exercise this great power, which deals not only with the particular debt of the petitioning creditor, but with the whole class of the creditors of the debtor, including the petitioning creditor,—whether the Court of Bankruptcy ought to exercise its power and authority when there are the strongest grounds for believing that there is no petitioning creditor's debt upon which it can be put in motion, and the whole foundation upon which the Court is authorized and empowered to do such a strong thing as to make a receiving order, or to declare a man a bankrupt, is that a petitioning creditor's debt exists. It is not denied that at a

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subsequent stage of the proceedings, upon the suggestion of another creditor, this very petitioning creditor's debt, if the allegations now made were then made, must be inquired into, and that, if what is now stated were then proved, the debt would no longer be considered a debt in the Court of Bankruptcy, although a judgment had been obtained for it. The petitioning creditor's debt, on which the bankruptcy proceedings had been founded, would then be struck out altogether, and he would have no claim to interfere in the proceedings, and the Court would find itself in this position, that it had used its authority to declare a man a bankrupt upon a debt alleged to exist when there was really never any such debt at all. I cannot help thinking that this goes a long way to shew that the Court would be placed in an entirely false position. So far as the debtor is concerned, it might well be said that it was his own fault. Why did he consent to the judgment? But I do not think that the power of the Court of Bankruptcy is to be exercised merely by way of punishment against the debtor. The Court ought not to be forced to act when, according to its own rules, the very foundation of its action is cut away. I think it ought in such a case to hold its hand at the very earliest stage of the proceedings, and to decline to exercise its jurisdiction.

It is not denied that *Ex parte Kibble* (1) is a direct decision of the Court of Appeal that, under some circumstances, a judgment debt may be inquired into, and the circumstances under which the judgment was given investigated, at the instance of the debtor himself, when he is disputing whether an adjudication ought to be made against him. And, for the reasons which I have endeavoured to express, not only do I think that that case is a binding authority upon us, but I think that it was rightly decided upon principle, the principle being that the Court of Bankruptcy is entitled to see that it is not put in motion without foundation, when there is no petitioning creditor's debt at all. The Court has that right independently of the conduct of the debtor or of the creditor or of any one else. And I cannot help thinking that the inquiry which was entered into before the decision was given in *Ex parte Ritso* (2) shews that the judges were there acting

(1) Law Rep. 10 Ch. 373. (2) 22 Ch. D. 529.

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upon the same view as in *Ex parte Kibble*. (1) It is true that they did not pursue the inquiry, because in their view it would in that case have been futile. I am inclined to think that in *Ex parte Prescott* (2) also the same view was taken. The authority, however, of *Ex parte Kibble* (1) seems to me quite sufficient, and I think it was decided on right principles. If that be so, it is not true to say that the mere fact of a judgment existing ought to prevent the Court at the instance of the debtor at the first stage of the proceedings, viz., when a receiving order is applied for, from inquiring whether there was any real debt as the foundation of the judgment, and, although by consenting to a judgment the debtor is estopped everywhere else from saying that there was no debt due—although the judgment is binding upon him by reason of his consent, and of its being the judgment of the Court, yet no such estoppel is effectual as against the Court of Bankruptcy. The Court is not estopped by the conduct of the parties, but it has a right to inquire into the debt.

If that be true, what was the state of things when this case was brought before the Court? It cannot be doubted that a judgment is primâ facie evidence of a debt, and that a judgment or order to which a debtor has consented is far stronger evidence against him of the validity of the debt for which it purports to be given than a mere judgment by default. It is very strong evidence against him. Nevertheless, it seems to me that, upon certain allegations being brought forward, the Court is entitled to inquire into the alleged debt, and the Court, exercising a judicial authority, is bound to do so upon a sufficient case being shewn. Circumstances may be alleged which would shew that the judgment ought to be disregarded in bankruptcy. Those circumstances must differ in each particular case, and if, when the case is brought before the Court at that stage, the Registrar is of opinion that, even if all the circumstances alleged were proved, they would not be sufficient to induce him to set aside that which is strong primâ facie evidence against the debtor, and to disregard the consent judgment, he might stop there, and say, I will not hear the evidence; it would be useless to hear it if that is all you can allege. Of course his view would be subject to an appeal. But, if the

(1) Law Rep. 10 Ch. 373. (2) 1 M. D. & De G. 199.

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circumstances alleged before him and offered in evidence are such, that, if proved, they would clearly shew that there was no debt at all, and certainly if they would shew that that which was alleged to be a debt was a mere fraud, and a fraud known to the petitioning creditor who had obtained the judgment, and acted upon by him, it seems to me that it would be monstrous to say that the Court of Bankruptcy ought to stop, and say that, although these allegations were made, and even though (for the argument must go that length) they were so made that the Court must have the strongest suspicion that there never was any debt, yet it was bound, as a matter of law, to say that it was "satisfied" that the receiving order ought to go. That would be asking the Court to say that which to the mind of the judge who was making the declaration would not be true. He could not say that he was "satisfied." It seems to me that when such allegations are made and proof is offered of them, an inquiry into the debt ought to be made. Of course, if the allegations fail to be proved—if something less is proved—the Court entering into the inquiry with a strong primâ facie case against the allegations—the debtor having consented to a judgment which is the strongest evidence against him—if any part of his proof fails, he must take the consequences. I should say that the Court ought to lean heavily in favour of a judgment so obtained. But the question is, whether, even though it were proved to the satisfaction of everyone that there was no original debt, yet the judgment must be enforced merely because the debtor had consented to it. I think the hands of the Bankruptcy Court are not thus tied by such a consent of the debtor, and the Court is not to be made an instrument to act upon an alleged debt, where in truth and in fact there never was a debt at all. I think that the Registrar, upon the allegations which were made to him, and of which evidence was clearly tendered to him, and which, if they are true, shew that the petitioning creditor ought not to be allowed to say that there is a debt due to him from the debtor—I think that, looking at *Ex parte Kibble* (1), the Registrar ought not under such circumstances to have said, without any regard to the facts, that he felt himself bound, merely because there was a judgment by consent,

(1) Law Rep. 10 Ch. 373.

and the allegations were made by the debtor at that stage of the proceedings, to hold that he could not inquire into those facts. I think that he was wrong, and that he ought to have heard the evidence, and to have determined the case upon the evidence so given. I think, therefore, that the case ought to be remitted to the Registrar, in order that such an inquiry may be made.

Of course, if the debtor does not come forward as a witness, the inevitable result will be that the Court will scout the whole case. The debtor and Mr. Williamson must of course be called, and then a very sharp and decisive inquiry will be made as to the truth of the appellant's allegations.

COTTON, L.J. This case is one of very considerable importance. The petitioning creditor asked for a receiving order, upon the ground that he had a debt of 1600*l.* due to him, which had been established by a judgment, and that an act of bankruptcy had been committed by the appellant. When the matter came before the Registrar objections were taken to the debt, and on behalf of the debtor it was attempted to prove that, although the judgment had been obtained by reason of his not defending the action, and consenting to an order for the amount claimed, yet in fact the petitioning creditor had obtained the judgment in respect of that which was no debt at all. That is to say, his claim was founded upon a fraud to which he was privy. Of course we do not now give any opinion upon the facts. The Registrar thought that he ought not to allow the proposed evidence to be given, though the facts alleged would, if they were established, shew that there was really no debt in respect of which the judgment or order could properly have been obtained. The question is, ought the inquiry to be allowed? It has been long established, as regards the proof of a debt in bankruptcy, that the trustee, acting on behalf of the creditors, can go behind a judgment, and that, although the judgment is primâ facie evidence of a debt due to the creditor who claims to prove for the judgment debt, yet the trustee, on behalf of the creditors, may shew that in fact the judgment does not establish a debt. That rule is founded upon this principle—that, under whatever circumstances a judgment may have been obtained against the bankrupt, yet no act of

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his—collusion, compromise improperly entered into, or anything else—ought to prejudice the rights of the other creditors, because the assets ought to be distributed in the bankruptcy only amongst the honest bonâ fide creditors of the bankrupt. This rule is necessary, as was said by James, L.J., in *Ex parte Kibble* (1), in order to prevent a man from allowing any number of judgments to be obtained by default against him by his friends or relations, for the purpose of giving them a right of proof in his bankruptcy without any debt being due to them at all. That principle does not, however, apply to the present case, because we are not now dealing with a question of proof. We are asked, at the instance of the debtor, to enter into the question whether there ought to be any bankruptcy at all. The principle, therefore, on which, in cases as to proof of debt, the trustee, on behalf of the creditors, has been allowed to go behind the judgment, does not apply to the present case, and, if there were no authority on the point, I should have felt very great difficulty about it. But *Ex parte Kibble* (2) is an authority of the Court of Appeal, that, for the purpose of deciding whether there ought to be an adjudication of bankruptcy, the Court will, on the application of the debtor, enter into the question whether a judgment is sufficient evidence of a debt—whether, when the facts behind the judgment are known, there is sufficient evidence to satisfy the Court that a debt really existed. What was the principle of that decision? Mr. Vaughan Williams said, that in no instance ought the Court to go behind a judgment on the question of adjudication, unless there are circumstances such as to give the debtor an equitable right to impeach the judgment. As I understand his argument, he would limit the power of the Court of Bankruptcy to the equitable jurisdiction which would have been exercised by the Court of Chancery, if it had been sought to enforce the judgment against a man who was not a bankrupt—an individual who was simply defending himself. I think that cannot be the principle of *Ex parte Kibble* (2), because I do not see that any ground was there suggested on behalf of the alleged debtor which would have given him any equity against the judgment. It is true that the judgment had been obtained by default, but there was no suggestion of any

(1) Law Rep. 10 Ch. at p. 377. (2) Law Rep. 10 Ch. 373.

concealment or want of notice, or anything which could raise an equity against the judgment. Yet the Court did inquire whether the debt was a valid one, and it held, notwithstanding the judgment, that there was no debt in respect of which a judgment ought to have been obtained, and it confirmed the decision of the Registrar, that an adjudication ought not to be made. Now what is the principle of that decision? Not that there were any special merits on the part of the debtor, but, simply this, that the Court was satisfied upon the evidence which was allowed to be given, that the alleged debt, in respect of which the judgment had been obtained, arose out of transactions during the infancy of the debtor. The Court said that such a judgment was contrary to law, and that, therefore, the judgment did not establish any real debt to be due to the petitioning creditor. Mr. Vaughan Williams endeavoured to distinguish that case from the present, on the ground that the Infants' Relief Act had prevented the transactions during infancy from giving any good claim against the debtor. In my opinion there is not any real distinction. It was a conclusion of law, not depending upon any statute, that a claim, the origin of which was fraudulent, could not establish a good debt against the person upon whom the fraud had been committed. I cannot, therefore, consider that *Ex parte Kibble* (1) in any way limited the principle upon which the Court there acted to the case suggested by Mr. Vaughan Williams. What must have been the principle? In my opinion, it must be that which has been referred to by the Master of the Rolls, viz., that the Court is not bound to make a receiving order, even if a debt is established. The Court may dismiss the petition, "if it is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or that for other sufficient cause no order ought to be made." Even if the debt is established, and the act of bankruptcy is established, and all the other formalities established to the satisfaction of the Court, still the Court has a discretion. What, under circumstances like those of the present case, ought to be the guide of the Court in the exercise of its discretion? It is asked to make an order which will affect the mode by which the other creditors can enforce their claims against

(1) Law Rep. 10 Ch. 873.

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the debtor, and may interfere with them considerably, an order which will put in force the extraordinary power of the Court of Bankruptcy. I think that, if the Court is satisfied that the claim is made in respect of something which would give the claimant no right of proof in the bankruptcy, and no right to come in as a creditor in the bankruptcy, it ought not to make a receiving order. Here the Registrar has refused to inquire into the truth of allegations which, if proved, would entirely defeat the debt, and destroy any right to prove in the bankruptcy. I think, upon the principle which I have stated, that we ought not to put the powers of the Court of Bankruptcy into operation by making a receiving order, without requiring the matters alleged by the appellant to be investigated. I agree with what the Master of the Rolls said, that it is idle to suppose that the judgment can be set aside or disregarded, unless the appellant will submit himself to examination. We express no opinion as to whether his case will be established. All we say is, that these allegations being made, which, if they are established, would clearly shew that there was no debt, there ought to be an opportunity of investigating them, and a receiving order ought not to be made at present. The order must be reversed, and the matter must go back to the Registrar.

LINDLEY, L.J. I am of the same opinion.

If we looked at the case only as between the judgment creditor and the judgment debtor, I am not aware that there are any grounds upon which the judgment debtor is entitled to have the judgment set aside, or execution upon it stayed. I concede that to the fullest extent. I can see no equitable ground, and I can see no legal ground for doing that. But it appears to me that it by no means follows as a matter of course, that the judgment creditor is entitled to have a receiving order made against his judgment debtor. Bankruptcy proceedings are not like ordinary proceedings; they are a very serious matter, not only to the debtor himself, but to all his other creditors; and, before the machinery of the Court of Bankruptcy is put in motion, it appears to me that it is, not only the right, but the duty of the Court to see at whose instance it is asked to act. By the express language

of sub-s. 3, of s. 7 the Court is enabled to look into a judgment debt; and *Ex parte Kibble* (1) is conclusive on this point; for there, as here, the judgment debtor had no ground, legal or equitable, for getting rid of the judgment which had been signed against him. Mellish, L.J., seems to have had this point in his mind, for he said (2) "The statute" (that is the Infants' Relief Act) "in effect places a debt contracted during infancy in the same position as a gambling debt; and a bill of exchange given for a gambling debt cannot form the ground for an action. Even if the debtor does not plead that it was for a gambling debt, and lets the judgment go against him, still the Court of Bankruptcy will go behind the judgment, and declare the debt void." What does that mean? It means, I think, that, although the judgment debtor could not go behind the judgment, the Court of Bankruptcy will not allow itself to be put in motion at the instance of a person who is not a real creditor. The Court will not allow bankruptcy proceedings to be had recourse to for the purpose of enforcing debts which are fictitious, and not real, even although they are in the form of judgment debts. The Registrar has said, that he will not go into the matter at all. Matters have been stated to us which throw great suspicion upon the debt, and which, if true, would shew that no debt is really due. I do not say whether these allegations are true, for I do not know. But, if they are true, it would be wrong, in my opinion, to allow bankruptcy proceedings to be taken. These matters ought to be investigated, and the receiving order, of course, must be set aside. The costs, I think, ought to abide the result of the investigation.

COTTON, L.J. The deposit on the appeal will remain in Court at present.

Appeal allowed.

Solicitor for appellant: *H. W. Chatterton.*
Solicitor for petitioner: *C. F. Emmott.*

(1) Law Rep. 10 Ch. 373.

(2) Law Rep. 10 Ch. at p. 378.

W. L. C.

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[IN THE COURT OF APPEAL.]

BAINES *v.* WRIGHT AND ANOTHER.

Bankruptcy—Composition—Secured Creditor—Deposit of Goods—Bill given for Debt indorsed away—Composition paid to Indorsee without deducting Value of Security.

The plaintiff gave credit to the defendants for goods sold and made advances to them; goods were deposited by the defendants with the plaintiff as security, and bills were drawn by the plaintiff and accepted by the defendants for the amounts of the goods sold and advances made.

The plaintiff indorsed away such bills for value. During the currency thereof the defendants filed a petition for liquidation under the Bankruptcy Act, 1869, and their creditors duly resolved to accept a composition. The holders of the bills, by arrangement between themselves and the plaintiff, claimed and were paid the composition on the total amounts of the bills, the plaintiff paying them the balance thereof. The plaintiff did not send in any proof or claim any dividend but he realized his security by sale of the goods deposited and claimed to hold the proceeds against the balance so paid by him upon the bills:—

Held, affirming the decision of the Queen's Bench Division, that the plaintiff had no right to do so, as by such arrangement the holders of the bills had in effect received the composition for the benefit of the plaintiff, so that according to the bankrupt law he was bound to account to the defendants for the amount by which the composition paid on the bills exceeded that which would have been paid if the value of the security had been previously deducted.

APPEAL from the judgment of the Queen's Bench Division (1). The facts and questions in dispute were found by a special referee to whom the same were referred, and which, as reported by him, are fully set out in the report of the case before the Queen's Bench Division (1), and are shortly as follows:—

In 1881 the defendants, who were indebted to the plaintiff for wool they had purchased of the plaintiff, applied to the plaintiff to make them advances in addition to the credit which they had on their trade account, and the plaintiff consented to do this upon the terms that the defendants should deposit wool with him against such advances and accept bills drawn by the plaintiff for the amount of the advances and interest. This was done, and the plaintiff negotiated the bills, which were drawn on and accepted by the defendants in accordance with this arrangement. On the 24th of August, 1882, whilst such bills were current, the

(1) 15 Q. B. D. 102.

defendants filed a petition for liquidation, which resulted in a resolution by the creditors to accept a composition of 6*s.* in the pound. At the date of the liquidation petition some of the bills which the plaintiff had so negotiated were in the hands of his bankers, who had discounted them for him, and the remainder were held by creditors of the plaintiff, to whom he had indorsed them for value. By an arrangement between the plaintiff and the holders of the bills, the latter claimed and were paid the composition of 6*s.* in the pound on the amount of the bills, and the plaintiff made up the difference to such holders between the composition and the amount of the bills, and in one or two cases he paid the amounts before any dividend was received in respect thereof.

The plaintiff did not send in any proof or claim any dividend, but he insisted on his right as a secured creditor to avail himself to its utmost extent of the wool which had been so deposited with him as such security as above-mentioned. The balance of the debt due to the plaintiff, if credit were given for the amount realized by the sale of this wool, was found by the referee's report to have been 1692*l.* 4*s.* 2*d.*, the composition dividend on which would have been 507*l.* 13*s.* 2*d.*, but the amount of the composition dividend which the defendants paid to the holders of the bills was 1547*l.* 8*s.* making a difference of 1039*l.* 14*s.* 10*d.* between the two sums of 1547*l.* 8*s.* and 507*l.* 13*s.* 2*d.*, which difference the defendants in their counterclaim claimed against 938*l.* 6*s.* 9*d.*, the amount of the plaintiff's claim in the present action for goods sold and delivered to the defendants since their liquidation proceedings.

The Queen's Bench Division gave judgment for the defendants, being of opinion that the plaintiff was bound to repay to the defendants the 1039*l.* 14*s.* 10*d.*, which was the difference as above shewn between the composition actually paid and that which the plaintiff was only entitled to receive, namely the composition on the balance of the debt due after giving credit for what his security realized.

The plaintiff appealed.

A. Charles, *Q.C.*, and *R. O. B. Lane*, for the plaintiff. The

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judgment of the Queen's Bench Division cannot be supported. The wool was deposited with the plaintiff as security for a trade and advance account, and in order to redeem it the defendants would have been obliged to pay off both accounts. The liquidation of the defendants' affairs cannot affect the rights of the plaintiff. If the plaintiff takes no step in the liquidation, there is no equitable principle which prevents him from availing himself of his security. *Ex parte Mann* (1), which is relied on by Pollock, B., in the Court below, is a radically different case. There the creditor had not, as here, taken up the bills, and the real point now under consideration was left open. *Re Yewdall* (2) is in the plaintiff's favour. It cannot be assumed that the indorsees proved in the liquidation at the request of the plaintiff merely because the proof to some extent relieved him from their remedy over against him. The observations of Lord Selborne in *Royal Bank of Scotland* v. *Commercial Bank of Scotland* (3) are in the plaintiff's favour.

No doubt it is found by the referee that it was by arrangement with the plaintiff that the holders of the bills claimed under the liquidation proceedings, and were paid the composition on the amount of such bills; but, if apart from any such arrangement it was legal and proper for the holders to do this, it can be no objection that it was done by arrangement, there being no suggestion of fraud or collusion. It is only when the secured creditor proves under the bankruptcy of his debtor that the bankruptcy rule applies as to giving up the value of his security in order that the assets may be equally distributed amongst his creditors.

Horace Davey, Q.C., and *E. Tindal Atkinson*, for the defendants. If the plaintiff had retained the bills instead of indorsing them over, it is clear that he could not have proved for their amount without first valuing and deducting therefrom the value of the security he held. So if after the bills had been indorsed he had got them back from the indorsees before any dividend had been paid out of the bankrupt estate, he would have had a right to have proved against the estate, but subject to the value of his

(1) 5 Ch. D. 367. (2) 46 L. J. (Bkcy.) 87.
(3) 7 App. Cas. 366.

security, and if the value were greater than that at which he had valued it he would have had to account to the trustee in bankruptcy for the difference. Then the rule of the bankruptcy law applies to cases of composition: *Couldery* v. *Bartrum* (1); *Societé Générale de Paris* v. *Geen* (2). There is in fact here only one debt, and that cannot be divided into two debts to the advantage of the creditor. If the secured creditor permits the holders of the bills to prove against the acceptor's estate without putting a value on and availing himself of the security he holds, his debt is gone and he must be taken to have abandoned his security: *Ex parte Mann.* (3) In no case can the plaintiff be in a better position than he would have been in if he had not indorsed the bills. The payment of the composition to the holders of the bills under the arrangement with the plaintiff set out in paragraph 7 of the referee's report, was, in effect, the same as a payment to the plaintiff, for whose benefit the arrangement was made. The case of *Re Yewdall* (4) has no application to the present case. It only decided that the holder of the promissory note had a right to prove against the maker for the full amount without regard to the rights of a surety and his security. (5)

A. Charles, Q.C., replied.

LORD ESHER, M.R. In this case a mercantile debt was due from one person to another, and in respect of that debt the creditor drew bills upon his debtor, who accepted them, and at the same time gave security to the creditor for the payment of the acceptances. The transaction ending in bills of exchange, it must of course have been in the contemplation of both parties that the drawer would indorse the bills for the purpose of discount. If a bill is indorsed by the drawer such indorser becomes liable to his indorsee as a surety for the payment of the bill by the acceptor; but by the mercantile law if the drawer pays the bill his indorsee is bound to hand the bill back to him, and then

(1) 19 Ch. D. 394.
(2) 8 App. Cas. 606.
(3) 5 Ch. D. 367.
(4) 46 L. J. (Bkey.) 87.
(5) There was a cross-appeal on the ground that the decision of the Divisional Court ought to have given the defendants the whole benefit of the value of the security, but the cross appeal was abandoned by the defendants during the argument.

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the drawer has a right to sue the acceptor, not as surety, but upon the original obligation between them as drawer and acceptor.

Now, during the currency of the bill, whether the drawer indorses and gets it discounted, or whether he does not indorse it at all, the debt due to him from the acceptor in respect of which the bill was given, is not in abeyance, but is paid; but if the acceptor does not meet his acceptance, and the bill has never left or comes back to the drawer, the whole nature of the liability reverts back to what it was originally, and the drawer is a creditor of the acceptor for the debt for which the acceptance was given. In the present case, the acceptances and the security having been given, as I have stated, the bills were indorsed by the drawer, and during their currency, and before they had been presented to the acceptors for payment, and before the drawer had been called upon to pay his indorsees, the acceptors filed a petition for liquidation under the Bankruptcy Act. Now, it seems to me, that the moment an acceptor becomes bankrupt there are relations established according to the bankruptcy law which modify the rights of almost all the parties. In the usual and ordinary course of business when the acceptor is bankrupt, but the indorser is solvent, his indorsee immediately applies to his solvent indorser for payment. What is the duty of such indorser? Why to pay his indorsee at once the whole amount of the bill, and thereupon, having paid the holder, he would have the bill handed back to him and then, as against the acceptor who had become bankrupt, he would not be able to bring an action as he might otherwise have done, but he would have to claim in the bankruptcy with the other creditors. The security which he took would, in the event of bankruptcy, be still available only for its original purpose, namely, to secure the payment of the acceptance as between him and the acceptor, and if he keeps outside the bankruptcy he may, no doubt, under those circumstances, pay himself by means of such security, but if the security is of greater value than the amount of the acceptance he will become a debtor for the excess to the bankrupt's estate, and the trustee in bankruptcy will have a right to an inquiry as to what the drawer has done with the security. If, however, the

drawer who has such security, proves under the bankruptcy of the acceptor, he must value the security, and then when the security is sold, should it realize more than the value he has put upon it, he must account to the trustees in bankruptcy for the full value. But having valued it he can only prove in bankruptcy for the difference between the value and the whole of his debt. That is the case when the ordinary course of business is pursued, but suppose the extraordinary and unbusiness-like course were taken of the indorsee, who has a solvent indorser, choosing to pass by the solvent indorser, and proving his claim against the acceptor's estate; I do not deny that he may do so without being called upon to value his indorser's security, because the security was not given to him, but then if he does that and so relies only on his claim against the acceptor, the indorser, who was paid his debt when he discounted the bill, remains paid, and under those circumstances he cannot revert to his rights on the bill, and consequently he must hand over the security he held to the bankruptcy estate of the acceptor.

That being so, does it make any difference if instead of a bankruptcy there is a composition? I think not. The bankruptcy laws allow the debtor and his creditors to deal with all these matters in a particular way,—there may be a simple bankruptcy or there may be a composition, but whatever it is, the mode is one for settling claims amongst all the creditors of the bankrupt.

In the present case, which is a peculiar one, after having seen what would have happened in the ordinary course of business, and that the drawer who held a security for the payment of the acceptance, would have had to account to the bankruptcy estate of the acceptor for the value of such security, whether he proved under such estate, or dealt with the security outside such estate, and after having seen that the same would have happened if the indorsee had taken the unusual course of passing by the solvent indorser, and of going only against the estate of the insolvent acceptor, let us see if the bankruptcy laws will allow that to be done by arrangement between two creditors or between a creditor and an outsider which was done in the present case, by which there might be a different mode of dealing with property in bankruptcy, from that which would have happened if the business went on in

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the ordinary and usual way. To my mind the bankruptcy laws, whether considered as governed by the common law, the equity law, or the general governing principles which are at the bottom of the whole bankruptcy law, will not allow the usual mode of dealing in bankruptcy to be altered to the advantage of any one particular creditor.

That that is so, will clearly appear if the case be viewed under various aspects. As for example, if by such an arrangement as in the present case the indorsee, not intending to deal with the whole of the debt due from the acceptor, were to arrange with his indorser to prove against the estate for a part of the debt only, leaving such indorser either to prove for the rest of the debt, or to so deal with it as to make himself only a creditor as regards the trustee in bankruptcy for the rest of the debt, then in that case the parties would in breach of the bankruptcy law be attempting to let two persons prove in respect of different parts of a debt which is one and indivisible. Again, if by arrangement the indorsee were to do that which the indorsees did here, then, it seems to me, the dividend which he would receive must be considered, as between him and his indorser, as a payment to him by such indorser, and therefore when he received from such indorser the rest of the debt he was paid the whole of it, and ought to have handed back the bill to the indorser, who must then deal with the estate of the bankrupt acceptor as he would have been obliged to do if, having paid the amount of the bill, he were the holder of it. Another view may be this. Treating the security as a mortgage, can the debtor, in the event of his bankruptcy, by paying off part of the debt transform that which was a security for the whole debt into a security for the rest of the debt only? It seems to me that in bankruptcy he cannot do so, as it would be another way of evading the fundamental principle of the bankruptcy law.

Even if there were no arrangement between an indorsee and indorser, and the indorsee had without any such arrangement done what the indorsees did in this case, namely, proved against the estate of the acceptors, and had then insisted upon his rights as against the indorser for the difference due on the bill, I still think that the considerations I have mentioned would prevent

the indorser from dealing with his security otherwise than according to the ordinary rules of bankruptcy, as if the usual and ordinary course of business had been followed; but as it is not necessary to decide that point in the present case, I shall decline doing so, and I shall confine myself to the facts of the present case, where what has been done by the indorsees has been by arrangement between them and the indorser, and where therefore the result must be what I have stated. The present state of things I think never would have occurred except by arrangement between a solvent indorser and his indorsees, for the purpose of benefiting the indorser and taking him out of the inconvenience arising from the acceptors becoming bankrupt, but at all events, my decision is on the ground that in this case, what was done by the holders was done by that arrangement.

COTTON, L.J. In this case the defendants took advantage of the bankruptcy law and compounded with their creditors. The transaction with the plaintiff in respect of which this action has been brought was entered into after the bankruptcy, and the plaintiff established his claim for 938*l.* 6*s.* 9*d.* The question which we have to deal with arises upon the counter-claim in respect of the proceeds of certain quantities of wool deposited with the plaintiff previously to the bankruptcy proceedings as security for a debt due to him partly for advances of money and partly for goods supplied, and for the amount of which bills of exchange were drawn by the plaintiff and accepted by the defendants. Now what the Court below has found is this, that after satisfying the 938*l.* 6*s.* 9*d.* due to the plaintiff on his present claim, 101*l.* 8*s.* 1*d.* was left due to the defendants, and that was because the holders of the bills which had been so drawn on and accepted by the defendants had claimed and received a composition of six shillings in the pound on their amount, and the plaintiff afterwards, and notwithstanding the payment of such composition, had still retained the wool. Now if that had been all, I cannot say what my opinion would have been, but it is unnecessary to consider this, because one finds in the report of the referee that the claim of the composition by the holders of the bills and the payment of it to them was by an arrangement between the plaintiff and such holders.

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The effect of such arrangement was that the holders of the bills proved for, and received, such composition for the benefit of the plaintiff as regards his security. That it was for his benefit is clear, for suppose the ordinary course had been taken, and the holders had called upon the plaintiff to pay the bills, then, though he would have had a right to prove against the estate of the acceptors, yet he would have been compelled to have valued the security he held, and would have been allowed only to prove for the balance after deducting such value. Therefore this arrangement must have been in order to affect the plaintiff's right to prove so as to interfere with the ordinary rule in bankruptcy, which would have required him to deduct the value of the security and to get a dividend only on the balance.

Now the Court below have said that although in fact the proof by the holders of the bills cannot be taken as a proof by the plaintiff, yet it was a proof by arrangement under circumstances where the persons who proved could not be required to bring in the value of the security held by the plaintiff, and being by arrangement the Court would deal with the matter as if the plaintiff had not altered the ordinary course, but had himself paid the bills and then gone in and proved. In my judgment it would be wrong to allow the holders of securities to prevent the application of the ordinary rule in bankruptcy by means of an arrangement which, by getting the holders of the bills to prove without deducting the value of the securities, would enable the holders of the securities to receive more from the bankrupt estate than they would otherwise be entitled to. In the present case the proof was on the whole amount of the bills, without any deduction, and therefore the composition which was received was 1547*l.* 8*s.*, whereas if the ordinary course had been followed, and the security held by the plaintiff had been valued, then all that he could have received would have been 507*l.* 13*s.* 2*d.* Therefore in taking the account as regards his security, the plaintiff must bring in the difference between the 507*l.* 13*s.* 2*d.* and the 1547*l.* 8*s.*

In my opinion the decision of the Court below was right, but I give no opinion as to what would be the result where there was no arrangement between the holders of the bills and the holder of the security.

BOWEN, L.J. I would add nothing to what has been said if it were not that, to my mind, the strongest ground in support of the decision of the Court below is the broad ground that there was originally one debt, and one debt only, and that the money due on and secured by the acceptances was intended to be covered by the security deposited with the plaintiff, which was given for the debt in its entirety. Supposing the secured creditor, the plaintiff, to have retained the bills in his own hands, he obviously could not have proved on them against the bankruptcy estate of the acceptors, except only for the balance of his debt, after valuing the security. To my mind he cannot manipulate his debt so as to divide it into two debts, and by so doing evade the bankruptcy law with respect to his security. If he could do so he would throw on the bankrupt's estate a greater burden than if the debt had not been divided, and would enlarge the security which was given to secure one debt, into a security, not for the whole debt, but for a different and larger liability altogether. The dividend upon the whole debt which had been paid to the indorsees of the bills would in law be in extinguishment of the acceptor's liability to the debt, and yet the plaintiff, the indorser, would still hold the security, not for the original debt, but for a different and larger liability.

I do not say that the case of *Ex parte Mann* (1) is a decision in point, but I am clear that the learned judges who decided it, and who were no mean authorities on bankruptcy law, took the exact view which I am taking of the effect of this transaction, and it is on that ground that I think this case ought to be decided.

Appeal dismissed.

Solicitors for plaintiff: *Jaques, Layton, & Jaques, for Watson & Dickens.*

Solicitors for defendants: *Bigg, Chubb, & Adams, for Gardner & Jeffry.*

(1) 5 Ch. D. 367.

W. P.

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Nov. 6.

WALES, Appellant; THOMAS, Respondent.

Mine—Coal Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 76), *s.* 51—*General Rules, s.* 51, *sub-s.* 8, *f.* 2—*Compliance with, when reasonably practicable—Use of Gunpowder—Mine or Part of the Mine where it is used—Absence of Persons ordinarily employed in Mine.*

The Coal Mines Regulation Act, 1872, by s. 51 enacts that certain general rules shall be observed so far as is reasonably practicable, and among them that gunpowder or other explosive or inflammable substance shall not be used in the mine underground, during three months after any inflammable gas has been found in any such mine, if the inflammable gas issued so freely that it shewed a blue cap on the flame of the safety lamp, except when the persons ordinarily employed in the mine are out of the mine, "or out of the part of the mine where it is used":—

Held, that the expression "reasonably practicable" did not relate to the carrying on of the mine as a profitable concern, but to physical or engineering difficulties in the way of carrying out the rules, and

Held, also, that the expression, "part of the mine," did not mean the neighbourhood where the gunpowder would be used, but such a part of the mine as could be treated under the statute as a separate mine.

Case stated by the stipendiary magistrate for the district of Pontypridd, in the county of Glamorgan.

At a petty sessions holden at Pontypridd six informations were preferred by the appellant against the respondent for offences alleged to have been committed by him on the 17th of November, 1884, against the provisions of sub-rule (*f*) of rule 8 of the general rules forming part of s. 51 of the Coal Mines Regulation Act, 1872.

That section enacts:—"The following general rules shall be observed so far as is reasonably practicable in every mine to which this Act applies:— . . . .

"Rule 8.—Gunpowder or other explosive or inflammable substance shall only be used in the mine underground as follows:— . . .

(*f*) It shall not be taken into or be in the possession of any person in any mine, except in cartridges, and shall not be used, except in accordance with the following regulations, during three months after any inflammable gas has been found in any such mine; namely:—

(1.) A competent person, who shall be appointed for the

purpose, shall, immediately before firing the shot, examine the place where it is to be used, and the places contiguous thereto, and shall not allow the shot to be fired unless he finds it safe to do so, and a shot shall not be fired except by or under the direction of a competent person, who shall be appointed for the purpose:

(2.) If the said inflammable gas issued so freely that it shewed a blue cap on the flame of the safety lamp, it shall only be used—

(*a*) Either in those cases of stone drifts, stonework, and sinking of shafts, in which the ventilation is so managed that the return air from the place where the powder is used passes into the main return air-course without passing any place in actual course of working: or

(*b*) When the persons ordinarily employed in the mine are out of the mine, or out of the part of the mine where it is used:

(*g*) Where a mine is divided into separate panels in such manner that each panel has an independent intake and return air-way from the main air-course and the main return air-course, the provisions of this rule with respect to gunpowder or other explosive inflammable substance shall apply to each such panel in like manner as if it were a separate mine."

The magistrate decided to allow any amendments which might be necessary in the form of the informations to enable him to decide whether the respondent was, or was not, on the facts proved, guilty of any offence or offences under the above mentioned rule.

The following facts were either proved or admitted:

5. The respondent is the certificated manager of the Ynishir coal mine and colliery, situated at Ytsradyfodwg, in the county of Glamorgan, within the mines inspection district of South Wales, and was such manager during three months previous to the 17th of November, 1884, and the appellant is her Majesty's inspector of mines for the district.

6. The Ynishir colliery is a coal mine or mines within the

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meaning of the Coal Mines Regulation Act, 1872, and is owned and occupied by the Ynishir Colliery Company.

7. The seams of coal worked are the two feet nine inches and the four feet, both steam coals, giving off explosive gas in the usual quantities in seams of that sort, which is considerable. The mine is divided into three districts, viz. the "North Side" the "South Side" and the "Troedyrhiw."

8. The ventilation of the colliery is effected by means of a downcast shaft by which the air descends into the colliery and an upcast shaft up which the air ascends out of the colliery to the surface. From the bottom of the downcast shaft a main intake airway is constructed, from which a separate "split" or division of air is taken to ventilate each of the three districts. Each "split" of air is in the usual manner (by means of airtight doors, canvas or brattice doors, partly airtight, and sheets) made to traverse and ventilate the whole of the roadways and working places of its respective district; the split of air is then returned into the main return airway, by which means it is taken through the upcast shaft to the surface. A split of air is taken into the north side (four feet) seam and after it has proceeded round and ventilated that seam in that district, is carried into workings in the two feet nine seam before it is returned into the main return airway.

10. (1) The colliery is worked on what is called the long wall system, that is, by means of working places or stalls cut into the coal itself, the whole of the coal is worked out, and as the coal is cut away and removed rubbish is filled into the place from which the coal has been worked, except where a roadway or passage is left for the purpose of passing to and fro or carrying the coal from or the rubbish to the face of the coal where the coal is being cut.

11. Inflammable gas, issuing so freely that it shewed a blue cap on the flame of the safety lamp, had been found in the colliery during three months previous to the 17th of November, 1884, and on that day. The gas was found in a hole in the roof in a place called "Thomas Hopkins' heading."

12. In a main roadway (which was not a stone drift, stone work,

(1) Paragraphs and passages relating to a plan which accompanied the case are omitted.

or a sinking of shafts) cut through the four foot coal in the north side district, for about a week previous to the 17th of November, 1884, there had been a "squeeze" that is, the roof of the roadway had been sinking, and it became necessary for the maintenance and use of the roadway and for the working of the colliery that the "squeeze" should be removed.

13. For this purpose six shots were fired at a spot indicated hereafter as "A" on Monday, the 17th of November, 1884, between 12.30 A.M. and 5.30 A.M.

14. There were eighty-seven men working in the north side district at the time the shots were fired, such men being the persons ordinarily employed in the mine during the night turn.

15. From about 4 P.M. on Saturday the 15th of November, until about 7 P.M. on Sunday, the 16th of November, all persons ordinarily employed in the district were out of the mine and colliery. No shots were fired when the men were so out of the mine and colliery.

16. The roofs of the roadways in the four foot seam in the north side district of this colliery are of hard rock and difficult to work, and when a "squeeze" in this kind of roof occurs, it appears to be reasonable and expedient, having regard to the proper working of the colliery and to the fact that several shots in succession may be necessary, that shots for the purpose of bringing down such squeeze should be fired whilst the men ordinarily employed in the mine at the time of such firing are in the mine, but at such a distance from the place where such shot-firing occurs as to ensure their safety.

17. Air was "sealed" through the doors on each side of the point "A" for the purpose of ventilating the roadway. Such air passed the point "A" and subsequently joined the rest of the air which had proceeded round the working places, stalls, &c. Some of the air then passed through or by Thomas Hopkins' heading.

18. At the time when the shots were fired two men who were ordinarily employed in the mine were working at Scott's stall, and the air which passed the point "A" and afterwards, as mentioned in the last paragraph, passes in its course Thomas Hopkins' heading, passed onwards by Scott's stall, and thence on in the direction of and ultimately into the main return airway.

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19. The other of the eighty-seven men were working farther off from the point "A" than Scott's stall.

20. Thomas Hopkins' heading, where the gas was found, as mentioned in par. 11 of this case, was 250 yards from the spot "A" where the shots were fired. The nearest point where any workmen were actually working when the shots were fired was at Scott's stall some fifty yards further off from the point "A" than Hopkins' heading.

21. The fireman who fired the shots before doing so examined Thomas Hopkins' heading. The heading was then in its usual condition as to gas, but there was inflammable gas in the heading shewing a blue cap on the flame of the safety-lamp.

22. There was no danger to any of the eighty-seven persons employed at the time in the colliery in firing the shots at point "A."

23. Certified special rules are established for the colliery under the Act.

24. It was proved that there are no practical or usual means for detecting the presence of inflammable gas in a colliery except by its shewing a blue cap on the flame of a safety-lamp.

The magistrate dismissed the complaints.

R. S. Wright (*E. Thomas* with him), for the appellant. The object of the Act is, that the workers in a dangerous mine should be out of it when shots are fired. It is sufficient, however, if they are out of that which constitutes a mine in itself, by reason of a separate system of ventilation. Sect. 25 (1) allows such a part of a mine to be treated for all purposes as a mine, one of those purposes clearly is, firing shots, and when the expression "part of a mine" is used in s. 51, which deals with the use of gunpowder, although its insertion was not necessary, it must have the same meaning given to it as in s. 25, that is, separate part of a mine. That this is the intention is shewn by the next provision (*g*), which deals with panels, and provides that separate

(1) 35 & 36 Vict. c. 76, s. 25: "Where two or more parts of a mine are worked separately, the owner or agent of such mine may give notice in writing to that effect to the inspector of the district, and thereupon each such part shall, for all the purposes of this Act, be deemed to be a separate mine. . . ."

panels are for this purpose to be treated as mines. There was no insuperable engineering or other difficulty in the men being out of the mine when the shot was fired, and consequently it was "reasonably practicable" to comply with the rule, and an offence was committed in not doing so.

H. D. Greene, Q.C. (*T. W. Lewis* with him), for the respondent. Taking the first part of the sub-section, we find that if persons ordinarily employed in the mine are out of it, gunpowder may be used if the competent person who has charge of the firing thinks it safe. But the Act does not stop there. A mine frequently embraces many pits or shafts, with underground workings opening into each other, extending over many miles and in which thousands of men are employed. If it is necessary to remove all men from the mine when shots are fired, the working of many mines will be impossible. Consequently the legislature have enacted that where it may be safely done, it shall be sufficient that the men should be out of the part of the mine where the danger arises. The managers have to act, in removing men, on their own responsibility, and it is for the magistrate to look to all the circumstances of the case in determining whether an offence has been committed.

The rules in s. 51 are to be observed "so far as is reasonably practicable," and in par. 16 the magistrate finds that what was done was reasonable and expedient.

The expression "part of a mine" is used in the same way in s. 51, rule 6, by which workmen are to be withdrawn from "the mine or such part thereof as is found to be dangerous," by reason of noxious gases or otherwise. Rule (*g*) does not support the argument of the appellant, for the insertion of a clause dealing specifically with that separate part of a mine which is called a panel, shews that it was not intended to make the removal of the men compulsory in every case of a separate part of a mine.

E. Thomas, in reply.

DAY, J. I am clearly of opinion that the magistrate was wrong in the construction he put on the statute, and in its application to the facts before him. This Act provides by s. 25, that the owner of a colliery may divide his mine into two or

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more parts separately worked, and by giving notice to the inspector, and in the absence of objection, each part is to be deemed to be for the purposes of the Act a separate mine. So that where the word "mine" is used in the Act, it will apply to such a part of a mine. Turning to the particular clause we have to consider, if the words "part of a mine" were not inserted I should in effect have read them in, because I should have held that, by reason of s. 25, the statute was complied with, if the persons usually employed in the mine were out of that part of the mine where a shot is fired, since a mine may be divided into parts and where it is so divided, each part is to be considered a separate mine. I think it unfortunate that the legislature did not adapt the language of s. 51 to that previously used, but the words "part of a mine" have been inserted, and it is argued that this expression must mean something different from a "mine." I think, however, this contention is incorrect, and that the section applies to an entire mine, or to any part into which it may be divided for the purpose of separate working under s. 25. It is true that as s. 25 defines such a part to be a mine, the addition was unnecessary, but I think we must look to the object of the legislature in this enactment. That object was to protect the men by a rule which should not leave this matter to the discretion of the persons in control, but should provide against danger, even though the danger might not in all cases be imminent. To say that the miners are to be removed from the immediate neighbourhood of the danger, by taking them out of that part of the mine (using the word "part" in its popular sense) where the shot is fired, would not be to carry out the intention of the legislature. We know that the risk of injury from explosions is to some extent, though of course not uniformly, coincident in point of area with ventilation. Large mines are divided in different systems, or districts, or parts, or panels, with separate and distinct ventilation, and it seems to me that here the expression "part of a mine" is used as the equivalent of part of a mine considered as a mine because of its separate system of ventilation. In this view I am fortified by the wording of sub-s. (*g*) of this rule, which provides that a separate panel having separate ventilation shall be dealt with as if it were a separate mine, so that

where men are required to be out of a mine, it is sufficient that they should be out of the panel, supposing the mine to be divided into panels. Here the two points where the men were and where the shot was fired, are, as I construe the statute, in the same part of the mine. It seems to me it is impossible to construe the statute as first imposing a penalty if the men are not out of the mine in certain cases, and then as saying that no penalty shall be incurred if the men are not in immediate proximity to danger. Such a construction would be too vague to put on an Act of this description, and looking to see if there is not some more definite meaning to be attached to the words "part of a mine," I have no hesitation in arriving at the conclusion I have stated.

I have next to consider whether an offence has been committed under s. 51, looking at the words "so far as is reasonably practicable" by which it is introduced. Some of the provisions in this section are affirmative, and to these I understand the limitation to apply, and no penalty is to be incurred through not carrying out those enactments where such a course is not reasonably practicable. Many of the provisions are negative, and generally speaking they must be practicable, because it is always possible to do nothing. It has been urged that if the thing which the legislature says shall not be done would yield profit to the colliery, then it may be done, and that seems to be the view taken by the magistrate. We have nothing to do with what is practicable for the carrying on the colliery as a profitable business concern; that is for the legislature.

Turning this into an affirmative enactment, it says when a shot is fired men shall be out of the mine. There is nothing that is not reasonably practicable in that, no mechanical or other difficulty, and the magistrate has taken an erroneous view of the construction of this provision. The case will be sent back.

SMITH, J. I am also of opinion that the magistrate should have convicted in this case. The point is not a large one, but it is an important one: important to two classes of persons, the workers in the collieries and the owners. The question, however, is what does the statute say? Cutting up the section, the latter

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part would read, "when the persons ordinarily employed in the mine are out of that part of it where the gunpowder is used." Some interpretation must be put on these words, because if they mean that the men are only to be away from the neighbourhood where the gunpowder is used I cannot see why the legislature should have put in the first alternative "out of the mine." It should not be forgotten that this sub-s. 2 is dealing with a high state of inflammability. But the statute recognises a part of a mine for purposes of ventilation and other purposes, and I am of opinion that these words were inserted to limit the necessity for removing men from the whole mine when it is cut up into parts with separate systems of ventilation. In that case it is only requisite to get the men out of that part where the shot is fired. It is true that a mine may be cut up into panels, and I do not myself see the difference for this purpose between a panel and a part of a mine; but it seems to me that the true construction of the statute is that, unless the mine is cut up into parts or panels in which case the part or panel is pursuant to the statute to be deemed a separate mine, when the shot is fired the men must be out of the mine altogether. It was pressed on us that in other parts of s. 51 the expression "part" is not used in the sense in which the Court is now construing it. I am not so clear as to that, but at any rate in rule 5 the word is so used. "A station or stations shall be appointed at the entrance to the mine," that is, when there is one mine not divided into statutable parts "or to different parts of the mine," that is, where there are statutable parts, "as the case may require, and a workman shall not pass beyond any such station until the mine or part of the mine beyond the same has been inspected and stated to be safe." Whether or not the same construction is to be placed on the word in rule 6 which relates to the withdrawal of workmen in case of danger I have not formed an opinion, but I am clear that "part" in rule 5 means statutable part.

Now, if the districts into which this mine is cut up are not panels or statutable parts, it follows that this is a mine from the whole of which the persons ordinarily employed must be absent when a shot is fired. If it should turn out hereafter that this north district with which we are dealing is really a panel or a

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part within the 25th section, then if the men were out of that district, although underground elsewhere in the mine, there was no breach of the statute.

The only other point left to deal with is disposed of by saying that if the words "reasonably practicable" are read into this provision, there was nothing whatever to stop these eighty-seven men being out of the mine.

Case remitted.

Solicitors for appellant: *Williams & Lewis, Merthyr Tydfil, for Solicitor for the Treasury.*

Solicitors for respondent: *Simons & Plews, Merthyr Tydfil.*

A. M.

SMITH, APPELLANT; BUTLER, RESPONDENT.

Nov. 10.

Tramway—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 46, 48—*Bye-laws for the Regulation of travelling in or upon the Carriages on the Line—Practice on Appeals by Case stated under the Summary Jurisdiction Act*, 1879—*Costs.*

It is competent to the local authority of any borough to make and to enforce a bye-law, under s. 48 of the Tramways Act, 1870, for regulating the number of passengers to be carried in and upon tram-cars, and the extent of accommodation to be afforded to them. The assent of the lessees of the line (under s. 46) is not necessary to the validity of such bye-law.

The justices have no right to be heard in support of their decision, upon the argument of a case stated by them for the opinion of the Court under the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49.

CASE stated by justices under the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49.

John Butler, the respondent, the conductor of a carriage using a tramway in the borough of Bolton, was charged with unlawfully suffering to be carried at one time in or upon such carriage a greater number of passengers than would admit of the provision of sitting accommodation to the extent described in the rules and regulations relating to the tramways of the Bolton corporation and also to enable every such person to sit with ease, contrary to such rules and regulations made under the Tramways Act, 1870, and in force in the borough.

The information was laid under No. 8 of certain rules and

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regulations made under s. 48 of the Tramways Act, 1870, 33 & 34 Vict. c. 78, which are as follows:—

Sect. 48. "The local authority shall have the like power of making and enforcing rules and regulations and of granting licences with respect to all carriages using the tramways, and to all drivers, conductors, and other persons having charge of or using the same, and to the standings for the same, as they are for the time being entitled to make, enforce, and grant with respect to hackney-carriages and the drivers and other persons having the charge thereof and to the standings for the same in the streets and district of or under the control of the local authority: Provided always that in any district in which any of the powers aforesaid in relation to hackney-carriages and the matters aforesaid in connection therewith are vested in any authority other than the local authority of such district, such authority shall have and may exercise the powers by this section conferred upon the local authority."

No. 8 of the tramways rules and regulations made on the 16th of July, 1884, by the corporation of Bolton, acting as the council of the borough as the local authority of the district under the provisions of s. 48 of the Tramways Act, 1870, is as follows:— "No proprietor, driver, or conductor of a carriage using a tramway shall cause or suffer to be conveyed or carried at any one time in or upon such carriage a greater number of passengers than will admit of the provision of adequate sitting accommodation to the extent at least of 16 inches from side to side and 15 inches from front to back of every seat in respect of each person conveyed in or upon such carriage, and also of adequate accommodation to enable every such person to sit with ease."

James Smith, a police-constable of the borough, who was called in support of the information, said: "It is part of my duty to inspect the traffic on tramways. On the 15th of March last, I saw No. 28 car on the Chorley Road, going in the direction of Heaton. I got on the car, and found six passengers on the steps behind the car, 19 inside, and 22 outside, making a total of 47 passengers. The car had painted on it, 'To carry 18 inside and 20 out.' The respondent was the conductor. I have measured the car, and in accordance with the bye-laws it ought to

carry inside 9 passengers on each side, and 10 inches over. I measured the accommodation on the top. There were two seats of 13 feet 7 in. each in length, making room for 20 passengers outside, and 3 inches over. There were 22 persons outside."

On cross-examination he said: "I did not count if there were any children. I did not see any. I am not prepared to say there were not any. One of the men stood with his back against the driver. I do not know if he stood there at his request. It was a fine Sunday afternoon. I cannot say if I saw children outside. There were 10 persons on each seat on the top of the car, and 2 on the elevated platform where they walk on."

By s. 46 of the Tramways Act, 1870, the promoters of any tramways (in this case the corporation) and their lessees (in this case the respondent's employers) had the right from time to time to make regulations, inter alia "for regulating the travelling in or upon any carriage belonging to them."

By s. 48 of the same Act the local authority (in this case the corporation) have the like power of making and enforcing rules and regulations and of granting licences with respect to all carriages using the tramways, and to all drivers, conductors, and other persons having charge of or using the same, and to the standings for the same, as they are for the time being entitled to make, enforce, and grant with respect to hackney-carriages, and the drivers and other persons having the charge thereof, and to the standings for the same in the streets and district of or under the control of the local authority.

By 10 & 11 Vict. c. 89, s. 68, the local authority may make bye-laws for (amongst other purposes) regulating the number of persons to be carried by hackney-carriages plying within their district.

[The bye-laws were annexed to the case.]

For the respondent it was contended that he was not amenable to the bye-laws under which the information was laid, as not having the assent of the lessees of the line.

The magistrates were of opinion that the charge against the respondent was preferred under No. 8 of the bye-laws of the 16th of July, 1884, made as therein expressed under s. 48 of the Tramways Act, 1870, and not under the bye-laws made under s. 46 of

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that Act: and further that s. 48 of the Tramways Act, 1870, gave the local authority power to make alone rules and regulations and to grant licences to drivers, conductors, and other persons having charge of and using carriages, and to the standings for the same, as they are for the time being entitled to make, enforce, and grant with respect to hackney-carriages; but that, for the purpose of regulating the travelling in or upon any carriage belonging to them as provided in s. 46 of that Act, it was incumbent that the bye-law should be made conjointly with the lessees of the line; and that for that reason the bye-law No. 8 made in pursuance of s. 48 of the Tramways Act, 1870, not having the assent of the lessees, was bad: and they dismissed the summons.

The question for the opinion of the Court was, whether the magistrates were correct in their judgment.

Austen, for the appellant. The justices ought to have convicted the respondent. The bye-laws of the 16th of July, 1884, were properly made by the local authority under s. 48 of the Tramways Act, 1870. The power given by s. 46 to the promoters or their lessees does not enable them to make such a bye-law as that now in question, but only bye-laws for what may be called the internal regulation of the company, for enforcing the performance of their duties by their servants, and for preventing nuisances to their passengers and the public.

Aspland, contrà. The bye-laws under s. 48 of the Tramways Act, 1870, were intended to apply to the licensing of carriages and drivers and conductors and the regulation of the traffic along the streets under the management of the local authority. Those to be made under s. 46 were to regulate the mode of carrying on the business of the company or lessees, as in No. 15 of the rules of the 14th of May, 1884,—which bye-laws were made conjointly by the local authority and the lessees,—which provides that, "when any carriage contains the full number of passengers which may lawfully be conveyed thereby, no additional person shall enter, mount, or remain in or on any such carriage; and the conductor shall not permit any passenger beyond that number to enter or mount or remain in or upon any part of a carriage."

Austen referred to No. 3 of the bye-laws of the 16th of July, 1884.

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[DAY, J. "Lawfully:" that assumes that a previous regulation as to the number of passengers has been made.]

DAY, J. The question reserved for us in this case is, whether it was competent to the local authority, the corporation of Bolton, to make a bye-law for the regulation of the number of passengers to be conveyed, and the accommodation to be afforded to them. I am of opinion that it was. The 48th section of the Tramways Act, 1870, gives to the local authority the like power of making and enforcing rules and regulations, and of granting licences with respect to tramway-carriages and the drivers and conductors as they may make, enforce, and grant with respect to hackney-carriages; and there is nothing in the proviso to qualify that power. Acting under that section, the local authority have made a bye-law (No. 8) for regulating the number of passengers to be carried by tram-cars, and the extent of the accommodation to be afforded to them, and also a bye-law (No. 3) requiring every proprietor of a tram-carriage to cause a statement of the number of passengers authorized to be carried at any one time in and upon such carriage, to be painted conspicuously on the inside and outside of such carriage. I think they have acted clearly within their power. It is said that the promoters of the tramway or their lessees have power under s. 46 of the same Act to make bye-laws "for regulating the travelling in or upon any carriage belonging to them;" and that the bye-law in question required their assent as a condition of its validity. I cannot agree with that argument. The 46th section of the Tramways Act, 1870, would be satisfied by the making of bye-laws by the promoters of the tramway or their lessees for the regulation of their officers and the conduct of passengers, which it appears they have done. I think this case must be remitted to the justices with a direction to them to convict the respondent.

SMITH, J., concurred.

Case remitted.

Austen asked for the appellant's costs. It was stated that the respondent did not appear, and that *Aspland* was instructed by the justices.

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PER CURIAM. It is not usual to allow costs against a respondent who does not appear: and it is quite clear that the justices had no right to be heard. If we had known that Mr. Aspland appeared for them, we should not have listened to him.

Solicitor for appellant: *C. E. Abbott, for R. G. Hinnell, Town-Clerk, Bolton-le-Moors.*

Clerk to justices: *R. Winder.*

J. S.

Nov. 27.

[IN THE COURT OF APPEAL.]

EMMENS *v.* POTTLE AND OTHERS.

Libel—Publication—Newspaper—Liability of Vendor in Ordinary course of Business.

The vendor of a newspaper in the ordinary course of his business, though he is primâ facie liable for a libel contained in it, is not liable, if he can prove that he did not know that it contained a libel; that his ignorance was not due to any negligence on his own part; and that he did not know, and had no ground for supposing, that the newspaper was likely to contain libellous matter. If he can prove those facts he is not a publisher of the libel.

But whether such a person can escape liability for the libel if he knows, or ought to know, that the newspaper is likely to contain libellous matter, Quære.

APPEAL from the judgment of Wills, J., at the trial of the action with a jury.

The action was brought to recover damages for an alleged libel.

The plaintiff by his statement of claim alleged that "the defendants on or about the 11th of February, 1885, at Nos. 14 and 15, Royal Exchange, in the city of London, did falsely and maliciously publish of the plaintiff in the form of an article appearing in the newspaper known as *Money*, bearing date the 11th of February, 1885, by the sale thereof by their servants or agents, at such time and places aforesaid, for the defendants' benefit, to one Ernest Clarke," certain words set out in the statement of claim. The plaintiff alleged that in consequence of the promises he had been and was greatly injured in his credit and reputation, and he claimed 5000*l.* damages.

By the statement of defence (par. 1) the defendants denied that they had published the alleged libel. And further and alterna-

tively (par. 2) the defendants said "that they are newsvendors, carrying on a large business at 14 and 15, Royal Exchange, in the city of London, and as such newsvendors, and not otherwise, sold copies of the said periodical called *Money* in the ordinary course of their said business, and without any knowledge of its contents, which is the alleged publication."

The plaintiff by his reply joined issue on the first paragraph of the defence. And, as to the second paragraph of the defence, the plaintiff said "that the allegations therein contained are bad in substance and in law, on the ground that, even if the defendants sold copies of the said periodical without any knowledge of their contents and in the ordinary course of their business, as alleged in their defence, still, inasmuch as the defendants sold the said copies as newsvendors for reward in that behalf, the said allegations disclose no answer to the plaintiff's claim."

The action was tried on the 23rd of June, 1885, before Wills, J., with a jury.

The jury, in answer to questions put to them by the judge, found "that the defendants did not nor did either of them know that the newspapers at the time they sold them contained libels on the plaintiff; that it was not by negligence on the defendants' part that they did not know there was any libel in the newpapers; and that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so." The judge directed the jury to assess the damages provisionally, and they assessed them at one farthing, and the judge then ordered judgment to be entered for the defendants, with costs.

The plaintiff did not move for a new trial, but appealed from the judgment.

The appellant in person.

The proprietor of a newspaper is liable in damages for a libel contained in it, even though the publication takes place in his absence and without his knowledge. On the same principle a man who makes a profit by the sale of a newspaper should be held liable for a libel: *Rex* v. *Walter* (1); *Rex* v. *Dodd* (2); *Watts* v.

(1) 3 Esp. 21.

(2) 2 Sess. Cases, 33.

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Fraser (1); *R.* v. *Williams* (2); *R.* v. *Carlile* (3); *Day* v. *Bream* (4); *Hooper* v. *Truscott* (5); Odgers on Libel, pp. 160, 161. Even a lunatic may be liable for a libel: *Mordaunt* v. *Mordaunt* (6).

[LORD ESHER, M.R. That depends upon whether he is sane enough to know what he is doing.]

Why should a newsvendor be able to disseminate a libel without being in any way responsible for it? This would be a very dangerous doctrine. The publisher of the paper may be a man of straw or a bogus company. A grocer is liable if he sells an adulterated article, even if he has taken every care to obtain a pure article.

[LORD ESHER, M.R. In that case the liability is imposed by statute.]

If a man deals in dangerous articles he ought to be liable for any injury which is caused by them.

[BOWEN, L.J. Are you not bound to shew that a newspaper is in its nature a dangerous thing?]

There are respectable papers and there are disreputable papers. The liability would not be productive of any practical harm: the question of damages is always left to the jury, and the costs would be in the power of the Court.

Julian Robins, for the defendants, was not heard.

LORD ESHER, M.R. I am afraid it will not be much satisfaction to the plaintiff, as I am going to decide against him, for me to say that it would be impossible for any one to have argued a case in better form or with better logic than he has argued his own case. The principle is no doubt a very important one, and one well worthy of consideration. I do not intend to lay down any general rule as to what will absolve from liability for a libel persons who stand in the position of these defendants. But it is a material element in their position that the jury have found in their favour as they have done. I agree that the defendants are primâ facie liable. They have handed to other people a news-

(1) 7 C. & P. 369.
(2) 26 Howell's State Trials, 653, 656.
(3) 3 B. & A. 167.
(4) 2 M. & Rob. 54.
(5) 2 Scott, 672.
(6) Law Rep. 2 P. & D. 109 (per Kelly, C.B., at p. 142).

paper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to shew some circumstances which absolve them from liability, not by way of privilege, but facts which shew that they did not publish the libel. We must consider what the position of the defendants was. The proprietor of a newspaper, who publishes the paper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. But the defendants did not compose the libel on the plaintiff, they did not write it or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel? If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. That, I think, cannot be doubted. But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to shew that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and, still more, that they ought not to have known this, which must mean, that they ought not to have known it, having used reasonable care—the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel. If they were liable, the result would be that every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper were one of which every man in England would say that it was not likely to contain a libel. To my mind the mere statement of such a result shews that the proposition from which it flows is unreasonable and unjust. The question does not depend on any statute, but on the common law, and, in my opinion, any proposition the result of which would be to shew that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common

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Law of England. I think, therefore, that, upon the findings of the jury, the judgment for the defendants is right.

COTTON, L.J., concurred.

BOWEN, L.J. The jury have found as a fact that the defendants were innocent carriers of that which they did not know contained libellous matter, and which they had no reason to suppose was likely to contain libellous matter. A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury. It seems to me that the defendants are no more liable than any other innocent carrier of an article which he has no reason to suppose likely to be dangerous. But I by no means intend to say that the vendor of a newspaper will not be responsible for a libel contained in it, if he knows, or ought to know, that the paper is one which is likely to contain a libel.

Appeal dismissed.

Solicitor for plaintiff: *J. F. S. Cridland.*
Solicitor for defendants: *Gilbert Robins.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Nov. 30.

THE QUEEN ON THE PROSECUTION OF THE OVERSEERS OF WEDNESBURY, RESPONDENTS *v.* THE SOUTH STAFFORDSHIRE WATERWORKS COMPANY, APPELLANTS.

Poor-rate—Water Company—Assessment—Works in Excess of existing Requirements—Rateable Value.

A waterworks company had works extending over many parishes. All the works were in use for the supply of their customers, but they were in excess of the existing requirements of the company, and were created for and adapted to an increased supply in future years. In the calculation by which the rateable value of the mains and service pipes in one of the parishes supplied was to be arrived at:—

Held, that the whole of the works being used for the purpose of distributing water as a source of profit, the whole of the capital expenditure must be taken into account, and not merely so much as would have sufficed to provide the existing supply:

Held, also, that the deduction to be made in respect of the rates which the hypothetical tenant would have to pay, is the amount of the rates that would be payable on the sum at which the works ought to be assessed, and not necessarily the rates based on the existing valuation list.

SPECIAL CASE.

On an appeal to quarter sessions against a rate made by the overseers of the poor of the parish of Wednesbury, in the West Bromwich Poor Law Union, in the county of Stafford, the rate was confirmed subject to the following case stated by an arbitrator:—

1. The appellant company is a waterworks company incorporated and carrying on business under and by virtue of the South Staffordshire Waterworks Act, 1853 (16 & 17 Vict. c. cxxxiii.), and other Acts extending and amending the same.

2. By these statutes the appellants were authorized to issue capital, purchase lands, construct works, and supply water to the inhabitants of various parishes and places in Staffordshire and Worcestershire, Derbyshire and Warwickshire. They have the powers and liabilities given and imposed by the Waterworks Clauses Act, 1847, which is incorporated with their special Acts.

3. The appellants' undertaking together forms one entire system, and their rateable property consists of land, reservoirs, a

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tunnel, buildings, and machinery, and mains and service pipes by which the water is conveyed to the customers supplied. These works extend through, among other towns and parishes in the above-mentioned counties, the town and parish of Wednesbury.

4. By the valuation list upon which the rate appealed against is made the appellants are assessed upon their property in Wednesbury as follows: Parish, Wednesbury; description, water mains, service pipes, reservoir engines; gross estimated rental, 3006*l.*; rateable value, 2505*l.*

5. It is agreed by both parties that the whole rateable property of the appellants' undertaking may be treated as consisting of (*a*) land and works indirectly conducing to the earning of the company's profits, and to be rated as having a value for that purpose; (*b*) Distributing mains and service pipes directly producing profit; and also that these latter are to be rated in the different parishes in proportion to the gross receipts in each parish.

6. It is also agreed that after making all deductions from the gross receipts for maintenance, tenants' profits, and other charges, except rates, there remains a sum of 21,500*l.*, which represents the annual value of the property as a whole, or the rateable value, of the entire system.

7. The capital value of the land and works indirectly conducing to the earning of profits, or in other words, the sum at which such land and works could now be purchased or replaced, is 462,000*l.*

8. The land and works are largely in excess of the present requirements. The appellants' area of supply is continually growing from year to year, and is not yet nearly extended to the limits of their Acts. The number of houses supplied, the quantity of water supplied, and the amounts received for water rents, are continually increasing. The permanent works of the company are much greater than is requisite for the present supply after allowing a proper margin for contingencies, and do not exist merely for the purpose of the present supply, but to a considerable extent for the purposes of the increased supply of future years.

9. If, in estimating the rateable value of the appellants' works which directly produce profits in Wednesbury and other parishes,

a deduction is to be made for the whole of the permanent works above-mentioned, the amount of such deduction will be 18,400*l.*, and the annual value of the works directly producing profits will be 3100*l.* Upon this basis the assessment in Wednesbury will be as follows: Rateable value, plus rates, land and works, 2965*l.* 15*s.* 6*d.*; rateable value, 2326*l.* 2*s.*; and the rate appealed against ought to be reduced accordingly. (1)

All the figures in this case are given according to the condition of things existing on the 31st of December, 1880, the date accepted by both parties for taking the necessary accounts.

10. If, in estimating the rateable value of the appellants' works which directly produce profits in Wednesbury and other parishes, allowance is only to be made for so much of the permanent works above-mentioned as is required for the purposes of the present supply, after allowing a proper margin for contingencies, the rate appealed against and the order of quarter sessions, ought to be confirmed.

11. At the time of the making of the valuation list, and at the time of making the rate appealed against, and up to the present time, the works of the appellants indirectly conducing to the earning of profits in parishes outside the respondent parish and union were and are assessed at a much smaller amount than I find to be their rateable value according to the statements in paragraph 9.

12. If in estimating the rateable value of the appellants' works which directly produce profits in Wednesbury and other parishes, a deduction is to be made only of the amount at which the works indirectly conducing to the earning of profits are actually rated, the rate appealed against and the order of quarter sessions will stand.

(1) The following statement was given in an Appendix:—Capital value of the works over whole system indirectly conducing to the earning of profits: land, 28,000*l.*; tunnel, 25,000*l.*; reservoirs, 94,840*l.*; buildings and machinery, 140,000*l.*; carrying mains, 174,000*l.*;—461,840*l.*, say 462,000*l.* Net annual value at 3¼ per cent. on 462,000*l.* is 15,015*l.*; adding rates at 4*s.* 6*d.* in the pound, the average over the whole system, 3378*l.*, we get annual value including rates, 18,393*l.*, say 18,400*l.* Deducting from the annual value of the whole property agreed at 21,500*l.*, the annual value of the works above set out, 18,400*l.*; we get the annual value of works directly producing profits, 3100*l.*

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The question for the opinion of the Court is, whether the rate can be supported either—

(*a.*) On the grounds set out in paragraph 10; or

(*b.*) On those set out in paragraphs 11 and 12.

If the opinion of the Court is in the affirmative, the order of quarter sessions is to be affirmed.

If the opinion of the Court is in the negative, the order is to be quashed.

A. Young (*Lewis Edwards*, with him), in support of the order of sessions. The effect of a deduction in respect of the whole of the capital expenditure is to relieve the water company at the expense of the ratepayers. Only so much should be taken into account as was necessarily expended to earn the present income. A tenant desirous of making that income would not pay a rent for the surplus part of the capital which would bring him no return in the current year, and consequently this surplus should be left out of account, and the capital in respect of which an allowance is made would be, as stated in paragraph 10, so much as represents permanent works required for the purpose of the present supply. [He cited *Reg.* v. *Mile End Old Town.* (1)]

Underhill, Q.C. (*Boddam*, with him), for the company. To take only so much of the capital expenditure as is making profits in any one year and to treat the rest as if it did not exist, is to treat the company as if it merely existed for a certain year. That is wrong, for a tenancy for a year is not the equivalent of a tenancy from year to year. The works of the company are one entire system, and the tenant would have to take to the whole, and would, moreover, have a reasonable hope of continuing as tenant. Consequently, whether the capital expended is for present or future needs, it is capital in the concern, for the whole of which a deduction should be made. [He cited *Rex* v. *Mirfield* (2), and *Reg.* v. *North Staffordshire Ry. Co.* (3)]

A. Young, in reply.

MATHEW, J. I am of opinion that this order must be quashed, and in pronouncing that opinion I feel that what the Court can say in reference to the question presented to them will be of very

(1) 10 Q. B. 208. (2) 10 East, 219. (3) 30 L. J. (M.C.) 68.

little help to either party in arriving at the amount of rateable value of the property in the parish in which this property, the subject of the present case, is situated. The question is whether in the parish of Wednesbury, the annual value of the works producing profit have been correctly arrived at for the purpose of rating those works. The property in question is the property of a waterworks undertaking forming one entire system, with rateable property consisting of land, reservoirs, buildings, and machinery, mains and service pipes, by which the water is conveyed to the customers supplied, and the works extend through a number of towns and parishes, amongst others the town and parish of Wednesbury. There is no controversy upon one point, namely, that the correct principle of arriving at the rateable value appears to have been adopted in this case. The net profits of the whole undertaking have been ascertained, and then a calculation has been made of what annual sum the capital expenditure represents for rating purposes, and the balance is then sought to be distributed according to the proper proportion between the different parishes in which the profits are earned. But a great part of this capital outlay has been made in anticipation of future requirements of the company, and not with a view to the present requirements; and it is said that, inasmuch as the Parochial Assessment Act contemplates the case of a tenant from year to year, such tenant from year to year taking to these premises would only pay for so much as was earning profit, and therefore any excessive expenditure ought to be discarded and not taken into account. On the other hand, it is said, this is a going concern, to be carried on for many years, and a tenant taking this property would pay more than would represent present capital expenditure earning profit, because he would foresee that larger profits would be earned hereafter which would be a return for any outlay that he was called upon to make immediately. As I understand the controversy raised by the case, Mr. Underhill, upon the one hand, says none of the excess of the capital expenditure over present requirements ought to be eliminated, and Mr. Young says that the whole of it ought to be eliminated, and my answer is, that both are wrong. A tenant taking to this

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property would pay a higher rent, because of his anticipation that in future years it would yield greater profits, but upon the other hand he would not pay a rent representing the whole of the capital expenditure at the time because the return is postponed to a later period. It cannot be, upon the one hand, discarded as an element of calculation that the expenditure of capital is excessive, and it cannot, upon the other hand, be taken into account altogether as expenditure made. It has to be borne in mind in dealing with the question of the rent a tenant would pay, how much profit he could earn immediately, and also how much profit he ought to make in the future. Mr. Young says that that is opposed to the true principle of rating law, and that you are bound to take the tenant not as a tenant from year to year but a tenant for a year only, and that a tenant taking this property for a year would calculate merely the profits he would make, and pay no more rent than ought to be fairly paid having regard to those profits. I am satisfied that such a theory is utterly impossible of application, and there is abundant authority for shewing that while dealing with a tenant from year to year, according to the hypothesis suggested by the Parochial Assessment Act, you may take into account a tenant likely to continue in occupation for years to come. In the case of *Great Eastern Ry. Co.* v. *Haughley* (1), the Court applied that principle in calculating the amount of depreciation from year to year of the plant of the railway company. It was contended that the true principle was to treat the tenancy as for a year only, and therefore to value the plant at the beginning of the year and value it again at the end of the year, and the depreciation was said to be the difference between the two figures, but the Court held that the tenant from year to year was a tenant for a year with the prospect of remaining in possession, and therefore the depreciation was to be arrived at upon the average of a number of years, that is to say, the total time for which the plant was likely to last. Accepting that rule, it appears to me that both sides are wrong, and that, therefore this rate must be quashed, but that each party must pay his own costs.

(1) Law Rep. 1 Q. B. 666.

SMITH, J. I am of the same opinion.

Order of sessions quashed.

A. M.

The prosecutors appealed.

H. Mathews, Q.C., and *A. Young*, in support of the rate. It is not disputed that in rating a company of this description a proportion of the capital expended in the dead works of the company should be assignable to the particular parish in question, and be taken into account in calculating the rent payable by the hypothetical tenant of the works in such parish; but the point in dispute is how much of such capital should be allowed in such calculations, and whether that should be so allowed which is in excess of what is required for the present supply of water. It is found by the arbitrator that such capital is largely in excess of the present requirements, and the contention is that it is unreasonable to make a deduction in respect of capital which is so excessive. The Divisional Court seems to have assumed that the rate appealed against could only be supported on the supposition, that no deduction should be made for more expenditure of capital than would be required for a year's supply. The appellants never contended for that, but have always admitted that the hypothetical tenant was not to be treated as a tenant for one year only, but from year to year, and therefore a tenant who had a reasonable prospect of continuing to be such for another year, still, in ascertaining the rent he should give, the whole of the capital expended ought not to be deducted, but only so much as was required for the present supply. In *Reg.* v. *Overseers of Mile End Old Town* (1), Lord Denman, C.J., in delivering the judgment of the Court says: "The outlay of capital might furnish no such criterion, since it may have been injudiciously expended, and what was costly may have become worthless by subsequent changes." The rule of law for ascertaining the rateable value of property of this description is given in that case, and it is not so much the rule of law as its application which is now in dispute. 21,500*l.* is admitted in this case to be the gross receipts of the company,

(1) 10 Q. B. 208, at p. 218.

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then in order to ascertain the net profits, that sum is to be subjected to two deductions, one in respect of the value of the capital expended in dead works, and the other in respect of rates which would have to be paid. As to those rates which are the subject of the second point raised in this case the arbitrator finds that the property of the company in the other parishes outside Wednesbury is rated at a less rate than what it ought to be. But on what ground can it be said that therefore there should be a deduction in respect of rates which are not now actually payable. The rateable value is fixed by the valuation list for five years, and until that has been altered it must determine the amount at which the property ought to be assessed.

Underhill, Q.C., and *Boddam*, contrà. The whole undertaking with its works must be taken as it stands, and as one going concern. If it is not to be taken as it stands, its rateable value would have to be altered from time to time; but it is clear that it must be such as a tenant not for one year only, but from year to year, with a reasonable prospect of the tenancy continuing for several years, would give for it as it stands. The question of excess of works beyond that which is required for present supply cannot prevent the whole of the capital spent in the dead works of the company as they now stand, from being the proper subject of deduction from the company's receipts in order to find the rateable value of the property, according to the principle approved of by the Court of Queen's Bench in *Reg.* v. *Overseers of Mile End Old Town* (1), and in *Reg.* v. *West Middlesex Waterworks Co.* (2) The value of the land and capital expended by the company over the whole system is rightly found to be 462,000*l.*, and its annual value 15,015*l.*, calculating it at 3¼ on such 462,000*l.*, and it may well be that that percentage allows for the postponements of profits in consequence of the works being in excess of present supply.

[LORD ESHER, M.R. You say that 4*l.* per cent. might possibly be the proper percentage if the profits were immediate, and that there is nothing to shew, but that the percentage was taken at 3¼*l.* because the profits were postponed.]

Yes. Then as to the second point raised, the deduction for rates

(1) 10 Q. B. 208. (2) 1 E. & E. 716; 28 L. J. (M.C.) 135.

must not be limited to those actually paid, but should be such as ought to be paid. It is found here by the arbitrator that the works of the company in the outside parishes are assessed at less than their real rateable value. The deduction for rates should be calculated on the value at which such works ought to have been assessed, and not on that at which they are actually rated: *Reg.* v. *North Staffordshire Ry. Co.* (1)

H. Mathews, Q.C., replied.

LORD ESHER, M.R. The question in this case is how the proper authorities, the overseers of the poor of the parish of Wednesbury, ought to rate certain property in that parish, and for this purpose they have nothing to do with the property in other parishes. The property in question is part of a waterworks scheme, which is, and necessarily must be, a large undertaking formed for collecting water and distributing it afterwards amongst its customers. The water is collected by a system of pipes, by which it is brought from some distance: it may be from a distance of many miles, 50 or 100 and more. When so brought the water has to be pumped, generally by steam-engines, into reservoirs for the purpose of filtering, and sometimes it has to be pumped again to a high level reservoir above the height of the houses to be supplied. It is afterwards carried through distributing pipes until it comes to the service pipes, by which the water is sent to each house for the use of the occupiers. It is very rare that the whole of that system is in one parish, and it is generally in a great many, but the overseers of the parish who have to make a rate do so only with respect to that part of the property which is in their own parish, and if that was or could be actually let to a tenant there would be no difficulty in arriving at its rateable value; but they have to rate property which in fact is not let, and the legislature has said that in that case the property is to be rated as if it were let to a tenant from year to year; it has not said as if it were let to a tenant for a year, but to a tenant from year to year. In endeavouring to rate a property as if it were so let, everything is necessarily imaginary and unreal; and in making the calculations, especially with regard to great

(1) 3 E. & E. 392; 30 L. J. (M.C.) 68.

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works, such as those of waterworks and railway companies, no two calculations, though made by the most skilled persons in these matters, will ever agree in the figures. Disputes consequently arose as to what was the best mode of getting at these figures, and I take it that the case of *Reg.* v. *Overseers of Mile End Old Town* (1) shews the acquiescence of the Court of Queen's Bench in a particular mode for arriving at the proper figure. Not that any one has said that such figure represents the actual rent which the hypothetical tenant would give, but that it is the nearest to it, and the mode there adopted is the most reasonable one for ascertaining the proper rent. Now we have to apply that mode to the present case. There are here waterworks, the way of using which cannot be altered without altering the manner in which the whole system is worked. A part of them is in one parish and other parts are in others (the steam-engine, reservoirs, and pipes being in various different parishes), but every part of the works is used for the purpose of collecting and distributing the water. The works are found by the arbitrator to be larger than are required for the water which is distributed at the present time, but to diminish them for that purpose the works would have to be altered, and every part of them is used for collecting and distributing the water which is now distributed. Two points have been raised in the special case which has been stated. As regards the first of these points it was suggested that in making the calculation of that which the hypothetical tenant would give for the whole system in order to get at the rateable value of that part of the works which was in the parish of Wednesbury according to the mode adopted in *Reg.* v. *Overseers of Mile End Old Town* (1), one ought not to consider the value of all the works as they now exist, but only of such of them as were necessary for the water which was at present distributed.

The sessions having a difficulty in determining this point, desired to consult the High Court, and for that purpose sent the matter to an arbitrator to state a case, so as to raise this point for the opinion of that Court. Then there was a second point as to which the sessions desired also to consult the High Court, and that was whether, in estimating the rateable value of

(1) 10 Q. B. 208.

the works, the deduction for rates should be in respect of those which were then actually payable, or in respect of those which the hypothetical tenant would have to pay if he were a real tenant.

With regard to the first of these two points, according to the rule established by *Reg.* v. *Overseers of Mile End Old Town* (1), you are to try and find what is the rent which the hypothetical tenant of that part of the works of the undertaking which is in the parish of Wednesbury would pay, and then from that make the deductions which by statute are to be made if such tenant were a real tenant. Now in finding that you must consider that in order to distribute the water in that parish such tenant must use the works of the undertaking which are in other parishes, and those would be a dead loss to him, because his only profit would be in the parish of Wednesbury; so that in practice, though not in theory, you must really see what the hypothetical tenant would give for all the works in all the parishes; and having got at that rent, then you must consider what is the portion of it which he should pay if he were the tenant only of what is in this particular parish. That must depend upon how much of the works in this parish is profitable and how much of the works in the other parishes is a dead loss so far as he is concerned. In considering this, such hypothetical tenant is to be treated as the tenant of the works in this parish of Wednesbury as part of all the works of the system then in existence. There might be works of the undertaking which had not become part of the actual system, as, for instance, a reservoir or a second lot of engines not yet used at all, but constructed with the view of becoming part of the works in the future; such would be no part of the existing system of works, but would be intended for another system, and would of course be rejected in making the calculation. But that is not this case, for here every part of the works is in actual use, though they are too large for the supply of water at present required. Therefore, in answer to the first question raised by this special case, namely, whether in calculating the value of the works in this parish, allowance is to be made for all the works of the undertaking now in use, or only for such of them as are required for the present supply, I say that

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all the works which are now in use are to be taken into the account, and not such only of the works as are necessary for the present supply. Then, further, I think that the value of the whole, which is found by the arbitrator to be 462,000*l.*, has been arrived at upon a right theory. As the works in use are in excess of the present requirement, a tenant taking the whole or part of the property in a particular parish ought not in justice to be asked to pay the same rate of rent as he would if all the works were earning profit. Therefore, if the $3\frac{1}{4}$ per cent. mentioned by the arbitrator is the ordinary percentage upon the value of the capital laid out, one would think that the percentage in this case should be reduced to 3 per cent. or less; but it may be that the proper abatement has been made in fixing the percentage at $3\frac{1}{4}$, and as no question is asked as to such being or not the proper percentage, the Court has no right to give any opinion thereon, especially as the figures are not given in the case which would enable the Court to say what ought to be the percentage, and the only question (before us) as to this part of the first point is whether the 462,000*l.* has been arrived at upon a proper principle. I am of opinion that it has, since all the works must be taken into account, as they are all in existence and being used.

Then as to the second point. In carrying out in practice the system approved of in *Reg.* v. *Overseers of Mile End Old Town* (1), you invent two hypothetical tenants, one of the whole concern and the other of the part in a particular parish, and when you compare the one with the other you must not consider one as a tenant only for a year, and the other as a tenant from year to year, but the calculation must be made upon the theory that both are tenants from year to year. A tenant from year to year is not a tenant for one, two, three, or four years, but he is to be considered as a tenant capable of enjoying the property for an indefinite time, having a tenancy which it is expected will continue for more than a year, but which is liable to be put an end to by notice. Therefore with regard to the rates, in comparing the two tenants, in order to see what part of the whole property ought to be taken as within a particular parish, you get at the annual value of the whole as a whole in order to get the first figure, and

(1) 10 Q. B. 208.

then you make certain deductions in order to get at the rateable value of the whole. One of these deductions is the rates that the hypothetical tenant would have to pay. This is as imaginary as all the rest, and such tenant is not bound by the valuation list which binds existing tenants if they have not appealed, otherwise the rateable value would vary according as the calculation was made in the first or last of the five years of such list. The hypothetical tenant is in fact not bound by the valuation list, though probably it would be looked to, and its figures adopted. Therefore in answer to the second question, which is, whether a deduction is to be made in respect only of the actual rates payable, I say no, but the deduction is to be of the rates which would, as far as can be seen, be payable in respect of the works. Under these circumstances I have come to the conclusion that the rate appealed against cannot be supported, but must be quashed, and that therefore the decision of the Divisional Court was right.

COTTON, L.J. I am of the same opinion. What we have to decide is, what is the proper rate to be made on property of the waterworks company in the parish of Wednesbury, which property consists of service pipes used there for supplying water to the various occupiers in such parish, and by means of which a profit is gained? Now the water is not provided by those pipes, but is provided and made fit for delivery by other works, which all conduce to the earning of the profit. The net profit is not attributable to the service pipes solely, but to the water being supplied by works which in the present case are to a great extent outside the parish. Now the first question asked (and I will only deal with questions which are asked) is, whether in estimating the rateable value of the company's property in this parish of Wednesbury, one ought to take into account the whole of the property of the company indirectly conducing to profits, or only so much of it as would be sufficient for supplying the water actually supplied. In my opinion the whole of the works (the present value of which is found to be 462,000*l.*) ought to be taken into account, since they all in fact, as found by the arbitrator, are indirectly conducing to the earning of the profits of the company. This is

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according to the principle laid down in *Reg.* v. *Overseers of Mile End Old Town.* (1) Where the works are in different parishes, in considering the rate to be charged in respect of the part of the works in a particular parish, the rateable value of the whole has to be apportioned. I refer to the following, which was said by Wightman, J., in delivering the judgment of the Court of Queen's Bench in *Reg.* v. *West Middlesex Waterworks Co.* (2) "If an apparatus occupied by one occupier, consisting of several parts, lies in one parish, the rate is on the whole, and is received by that parish. If such an apparatus lies in several parishes, the occupier is liable for the same amount of rateable value, and no more; but that amount is to be apportioned among the parishes in which it lies; and the question then arises, as in the present case, what is the principle which regulates such apportionment? It is clear that each parish must rate the part that lies within it; such part becomes a separate rateable subject in that parish, and must be rated according to the Parochial Assessment Act, upon an estimate of the rent which that part would yield after proper deductions." That being so, you must, I think, take as a whole the works of the company forming part of the system in which their service pipes are in Wednesbury. Therefore, in my opinion, the proper answer to the first question is, that the view taken by the sessions, of putting out of calculation the value of the works which are not necessary for the present existing supply, is wrong.

As to the other question put to us, I think the Master of the Rolls has correctly said what is to be considered is the real rateable value of the property in the other parishes, and not that at which such property is assessed there. In my opinion, therefore, the rate appealed against must be quashed, but for reasons different from those given by the Court below. I wish it, however, to be understood that I expressly confine my judgment to the facts of this case, in which it appears that all the permanent works of the company indirectly contribute to the supply of water which is in fact supplied to this particular parish.

BOWEN, L.J. I am of the same opinion, and I have but few observations to add. Dealing with the case broadly, and apply-

(1) 10 Q. B. 208. (2) 1 E. & E. 716; 28 L. J. (M.C.) 135.

ing the principle of calculation to be found in *Reg.* v. *Overseers of Mile End Old Town* (1), to the question whether the valuer ought to take into consideration the whole of the works as they are, and the expenditure upon them, or whether, inasmuch as a portion of the expenditure would appear superfluous, the whole ought not to be so taken into account, it seems to me that there is a dominant fact upon the special case which decides the question, and that is, that every part of the works is used for the purpose of distributing the water as a source of profit. If that be so, it seems to me that the principle follows that you must take the whole expenditure as one of the figures upon which the calculation is to be made. If part of the undertaking were severable, and not used for the purpose of distributing water as a source of profit, and not likely to be so used within a reasonable period of time, then the principle might be different.

Upon the second point I have nothing to add to that which has been said by the other members of the Court.

Appeal dismissed.

Solicitors for prosecutors: *Robinson, Preston, & Stow, for Joseph & Edward Rowlands, Birmingham.*

Solicitors for waterworks company: *Tucker & Lake, for Wainwright, Dudley.*

(1) 10 Q. B. 208.

W. P.

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Dec. 1.

[IN THE COURT OF APPEAL.]

BUTLER *v.* BUTLER.

Husband and Wife—Action by Husband against Wife—Separate Estate—Money paid by Husband for Wife after Marriage—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75).

Before the coming into operation of the Married Women's Property Act, 1882, a husband in a court of equity might make his wife a defendant to a suit respecting her separate estate, and might obtain a decree against her for breach of any contract, whereby she had intended to bind the same, and that statute has not deprived a husband of any right or remedy, to which, if it had not been passed, he would have been entitled as against his wife in respect of her separate estate; and therefore it is now competent to a husband to maintain an action against his wife, and to charge her separate estate for money lent by him to her after their marriage, and for money paid by him for her after their marriage at her request made before or after their marriage.

Judgment of Wills, J. (14 Q. B. D. 831) affirmed.

ACTION by a husband against his wife to recover 1848*l.* out of her separate estate, for money paid on her behalf and for money lent to her.

At the trial before Wills, J., and a common jury it appeared that the marriage between the plaintiff and the defendant took place on the 7th of April, 1883. The wife was then carrying on a business of her own as a provision dealer. They lived away from the place of business, and she carried on the business after marriage apart from her husband. Before the marriage the plaintiff had, at the request of the defendant, paid sums of money for her in order to pay debts, which she owed in her business. After the marriage he paid other sums at her request, made both before and after the marriage, and he lent other sums to her.

Wills, J., was of opinion that in respect of the ante-nuptial liabilities of the wife to the husband the action could not be maintained, but that he had a right of action against her as to the post-nuptial loans and advances, and gave judgment accordingly. (1)

The defendant appealed from so much of the judgment of Wills, J., as held her liable to repay to the plaintiff the post-nuptial loans and advances.

(1) 14 Q. B. D. 831.

Nov. 19, 30; Dec. 1. *Rose-Innes*, for the defendant. With respect to the post-nuptial advances the learned judge relied on s. 1, sub-s. 3, of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which enacts that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to, and to bind, her separate property, unless the contrary be shewn;" and he referred to the cases of *Hewison* v. *Negus* (1), *Vansittart* v. *Vansittart* (2), and *Woodward* v. *Woodward* (3), as shewing, that a married woman has been held in equity to be capable to contract even with her husband with respect to property forming her separate estate. None of these, however, were cases in which a husband was suing his wife, and they are merely authorities which carry out the equitable doctrine of protecting a wife as regards her separate property. Prior to the Married Women's Property Act, 1882, the personality of a woman was gone when she married, and except as regarded what was necessary to protect her separate estate she had no power to contract. The Act of 1882 was intended in like manner to protect the wife's separate property, and not to give to the husband a right to sue her on her contract: *Cahill* v. *Cahill* (4), which has limited the doctrine laid down in *Vansittart* v. *Vansittart.* (2)

[COTTON, L.J. In *Cahill* v. *Cahill* (4) the land was not settled to the wife's separate use, and, therefore, she could not bind herself by her contract; she could have bound her interest in the land only by a deed acknowledged under the Act for the Abolition of Fines and Recoveries.]

In Macqueen on Husband and Wife, 3rd ed., ch. 15, p. 395, it is considered as at least doubtful, whether the husband can sue his wife under the powers conferred by the Married Women's Property Act, 1882.

[LORD ESHER, M.R. In 1 Daniell's Chancery Practice, 6th ed., ch. 2, s. 13, pp. 138, 139, it is said: "As a wife may sue her husband in respect of her separate property, so may a husband in a similar case sue his wife." (5) For the latter part of the

(1) 16 Beav. 594.
(2) 4 K. & J. 62.
(3) 3 D. J. & S. 672.
(4) 8 App. Cas. 420.
(5) See a passage to the same effect, 1 Daniell's Chancery Practice, ch. 3, s. 12, p. 186 (6th ed.).

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proposition *Warner* v. *Warner* (1), *Ainslie* v. *Medlicott* (2), and *Earl* v. *Ferris* (3) are cited.]

The Married Women's Property Act, 1882, confers no power upon a husband to sue his wife; that must depend upon the previously existing rules of equity.

[LORD ESHER, M.R. In the cases which I have mentioned, it appears to be assumed that in all matters relating to separate estate a husband can sue his wife. That implies that a wife has power to bind herself as to her separate estate by a contract; in order to enable the husband to sue her, there must be a contract.]

The doctrine as to separate estate does not so completely destroy the unity of person existing between the husband and wife as to enable him to sue her.

The plaintiff did not appear.

LORD ESHER, M.R. With regard to that part of the case which is now before us, the question is whether since the passing of the Married Women's Property Act, 1882, a husband can in a suit against his wife recover from her money, which after their marriage he has advanced to her on a contract by her either express or implied to repay it out of her separate estate. It is suggested that he cannot, and the reason alleged is that they cannot contract together so as to enable the husband to sue his wife for breach of contract. It is clear that at common law no action of that kind could be maintained, because there could be no contract between a husband and his wife, which the law recognised as giving to him a right of redress against her in the event of a breach of it by her. But it may be said that upon looking into the cases in equity it will be found that the judges, although as a general rule they took the same view as the judges of courts of common law, yet made an exception in those instances where a wife had a separate estate. Although no case is precisely in point, yet it seems to have been again and again held in courts of equity, that according to the recognised practice of those courts a wife having a separate estate was to be treated as a feme sole in all respects. If this was the rule

(1) 1 Dick. 90. (2) 13 Ves. 266.

(3) 19 Beav. 67.

in courts of equity, it follows that she would be liable to her husband in respect of any promise by her to him with regard to her separate estate, and that she would be answerable to him in respect of that which was the consideration moving from him to her, in order to maintain the promise by her to him charging her separate estate. The case in which it is most clearly recognised that a husband may make his wife a defendant in a suit respecting her separate estate, is *Earl* v. *Ferris*. (1) It follows from that case that in respect of anything, which a wife had undertaken to do with regard to her separate estate, she was a feme sole, and that her husband had a remedy against her by making her a defendant in a suit in the Court of Chancery. The Court of Appeal is a court of equity as well as of law, and can enforce the same remedies as the Court of Chancery formerly could. If this was the rule before the Married Women's Property Act, 1882, clearly that statute has not interfered with it, and has not taken away from a husband the rights and remedies, which he had against his wife in respect of her separate estate. I understand from the judgment of Wills, J., that he decided this part of the case on precisely the same grounds that I do. I may add that *Wake* v. *Parker* (2); *Davis* v. *Prout* (3), and *Brooke* v. *Brooke* (4) assume that a husband may sue his wife in respect of her separate estate, and the rule in equity is so stated in the passage which I have cited from 1 Daniell's Chancery Practice, 6th ed., ch. 2, s. 13, pp. 138, 139. That is a text-book of great accuracy.

COTTON, L.J. In this case judgment was given for the defendant as to part of the plaintiff's claim; there is no appeal as to that. As to that part in which there has been judgment for the plaintiff, the defendant has brought before us this appeal, and relies upon certain decisions and upon the principles of equity.

The old doctrine was that where property was settled to the separate use of the wife, she became, as regarded that property, in all respects a feme sole; but a mere settlement to her separate use was not a sufficient protection, because she might be under the influence and control of her husband, and she might be induced to part with her property to him and to others. There-

(1) 19 Beav. 67.
(2) 2 Keen, 59.
(3) 7 Beav. 288.
(4) 27 L. J. (Ch.) 639.

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fore, in order to protect her more effectually, the doctrine as to restraint upon anticipation was introduced. Where a wife was not protected by a restraint upon anticipation, she could give her separate property to her husband and could contract with him as to it, as if she were a feme sole; her husband could sue her in a court of equity, and she as plaintiff might sue him by her next friend. But in all cases in which the interests of the husband and of the wife were not adverse, the husband and the wife were joined as parties to the action; the old rule is recognised in the Married Women's Property Act, 1882, s. 1, sub-s. 2, where it is enacted that the husband need not be joined with the wife as plaintiff or defendant, or be made a party to any action or other proceeding brought by or taken against her. It is now unnecessary to join the husband; but even under the old law that was unnecessary when the litigation was with the husband. In order to determine the rights of the parties in the present case, we must look at the general principles formerly prevailing in equity. I have never heard it disputed that as the wife could sue her husband in respect of her separate estate, so he could sue her in respect of any contract binding her separate estate. I rely upon the cases referred to by the Master of the Rolls. I give judgment against the appellant on the ground, that this action relates to a contract binding the wife's separate estate. I give no opinion what the law is as to a sum advanced by the husband not charged upon his wife's separate estate: it is difficult to suppose that a sum paid by a husband to his wife is a loan, if it is not advanced upon the security of her separate estate. It is said that the cases do not support the judgment of Wills, J.; but the doctrine laid down by him is the same as that enunciated by Lord Hatherley when he was Vice-Chancellor, in *Vansittart* v. *Vansittart* (1), and this decision is not overruled by *Cahill* v. *Cahill*. (2) The former case related to a matrimonial suit, and in *Cahill* v. *Cahill* (2) nothing can be found, which shews that a married woman cannot bind her separate estate by contract. *Cahill* v. *Cahill* (2) only shews that a husband cannot make his wife deal with property not settled to her separate use, as if it were separate property. The decision in that case does not interfere with *Vansittart* v. *Vansittart* (1), which is not impugned.

(1) 4 K. & J. 62.

(2) 8 App. Cas. 420.

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Ever since the doctrine of separate use has been established, a married woman has been considered in respect of her separate estate as a feme sole, and capable of making herself liable upon all contracts entered into by her with reference to it. I think that the judgment of Wills, J., is right.

BOWEN, L.J. Upon principle and authority it is clear that before the Married Women's Property Act, 1882, a husband could sue his wife in equity in respect of her separate estate; that is beyond dispute, and this statute does not take away any right existing before it was passed.

Appeal dismissed.

Solicitor for defendant: *C. A. Angier.*

J. E. H.

[IN THE COURT OF APPEAL.]

Dec. 4.

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Metropolis Management Acts—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*New Street—Liability to Expense of Paving—"House"—"Land"—"Owner"—Trustees of Chapel.*

By the term "houses," in s. 105 of the Metropolis Local Management Act, 1855, and the term "land," in s. 77 of the Metropolis Local Management Act, 1862, it is intended to include (with certain exceptions) all the frontage of a new street, so as to make all the owners of the frontage liable to contribute to the expense of paving the new street.

The word "house" includes every building which is capable of being used as a human habitation. If a building, which is physically capable of being so used, is prevented, either by common law or statute, from being ever put to such a use, it is exempted from the liability to contribute to the expense.

A consecrated church of the Established Church of England is exempted, because, by reason of its consecration, it becomes by the common law for ever incapable of being used as an habitation for man.

But *held*, that a leasehold chapel fronting on a new street, the chapel being vested in trustees, on trust to permit it to be used as a place of religious worship by a congregation of Wesleyans, was a house within the meaning of s. 105, on the ground that, by the consent of the landlord, the trustees, and the cestuis que trustent, the trusts might at any moment be put an end to:—

Held, also, that the trustees were the "owners" of the chapel, and as such liable to contribute to the expense of paving the new street.

Angell v. *Vestry of Paddington* (Law Rep. 3 Q. B. 714); *Caiger* v. *Vestry of St. Mary, Islington* (50 L. J. (M.C.) 59); and other cases commented on.

APPEAL from an order of a Divisional Court (Lord Coleridge, C.J., and Mathew, J.), that the appellants should pay an appor-

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tioned part of the expense of forming and paving certain new streets, under the provisions of the Metropolis Local Management Acts of 1855 and 1862.

The appellants were the trustees of a Wesleyan chapel, with schools and land attached to it, situate within the district of the Board of Works for the Lewisham district, which was a district board constituted by the Metropolis Local Management Act, 1855. The respondent, Edward Wright, was the secretary of the board. The chapel, schools, and land were one entire property, but the chapel and the schools were separate and distinct buildings, and were occupied by a congregation of the Wesleyan body solely for their religious and educational purposes, and they were held by the appellants as trustees under a certain deed of trust, dated the 14th of July, 1870. The property stood at the junction of two streets, called respectively Albion Road and Bonfield Road, the front of the chapel, the schools, and a small piece of land not built upon, abutting on Albion Road; the side of the chapel abutting on Bonfield Road. Both the roads were "new streets" within the meaning of the Acts. The board had duly resolved that the two roads respectively were not paved and formed to their satisfaction, and that they should respectively be so paved and formed under the provisions of s. 105 of the Act of 1885, as extended and amended by s. 77 of the Act of 1862, and that the expense thereof respectively should be charged upon and apportioned between the owners of the houses and land abutting on such new streets respectively, and had required the appellants to pay the sum of 78*l.* 18*s.* as their apportioned part of the expense of forming and paving Albion Road, and the sum of 25*l.* 18*s.* as their apportioned part of the expense of forming and paving Bonfield Road. Of the 78*l.* 18*s.* the sum of 38*l.* 4*s.* was due in respect of the chapel itself, and the sum of 40*l.* 14*s.* in respect of the schools and the vacant land. The 25*l.* 18*s.* was due in respect of the chapel only. The appellants declined to pay these amounts, on the ground that they were not "owners" of the property within the meaning of the Acts, and that the property was not a "house" or "land" within the meaning of s. 105 of the Act of 1855 as extended by s. 77 of the Act of 1862.

The whole property was held by the appellants under a lease dated the 24th of March, 1870, for a term of ninety years from

the 25th of December, 1867, at the annual rent of a peppercorn for the first seven years of the term, and at the annual rent of 1*l.* during the remainder of the term. The lease contained a covenant by the lessees (inter alia) that they would not assign, aliene, underlet, or part with the demised premises, or any part thereof, for any longer period than one year, without the license first had in writing of the lessors. There was also a proviso for re-entry by the lessors for non-payment of rent, or in case of the breach or non-performance of any of the lessees' covenants.

By a deed-poll dated the 14th of July, 1870, the appellants declared that they would stand possessed of the demised property upon such and the same trusts as were expressed and declared in and by a certain deed dated the 3rd of July, 1832, and enrolled in the Court of Chancery on the 25th of July, 1832, being a deed for the settlement of a piece of land and chapel situate at Skircoat, in the parish of Halifax, for the use of the people called Methodists in the connection established by the late Rev. John Wesley, "and to and for and upon no other use, trust, intent, or purpose whatsoever."

The deed of the 3rd of July, 1832, contained various recitals shewing "the origin and formation of the societies of the people called Methodists," and the constitution of a body called "The Conference." And the deed provided that the trustees thereby appointed should hold a piece of land, which was thereby conveyed to them in fee, upon trust, out of moneys then or thereafter to be possessed by them for the purpose, to build on the land a chapel or place of religious worship, and a dwelling-house, school-room, and other appurtenances, and upon further trust from time to time and at all times after the erection thereof to suffer the chapel, with the appurtenances, "to be used, occupied, and enjoyed as and for a place of religious worship by a congregation of Protestants of the said people called Methodists in the connexion established by the said John Wesley as aforesaid, and for public and other meetings and services held according to the rules and usage of the said people called Methodists, and do and shall from time to time and at all times hereafter permit and suffer such person and persons as are hereinafter mentioned or designated, and such person and persons only, to preach and

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expound God's holy word, and to perform the usual acts of religious worship therein, that is to say, such person and persons as shall be from time to time approved, and for that purpose duly appointed, by the said Conference of the said people called Methodists," and also such other person or persons as should be thereunto from time to time duly permitted or appointed in manner therein mentioned. Power was given to the trustees for the time being of the deed, or the major part of them, from time to time and at all times thereafter to mortgage in fee, or for any term or terms of years, the piece of ground, chapel, and premises, or any part or parts thereof respectively, to any person or persons, for securing such sum or sums of money as might be requisite or necessary for the due execution and accomplishment of the trusts and purposes of the deed or any of them. The trustees were also empowered to let the pews in the chapel and to let the schoolroom.

Power was also given to the trustees, with the consent of the "Conference," absolutely to sell and dispose of the piece of ground, chapel, and premises, and to convey the same to the purchaser or purchasers, and it was provided that the premises so sold and conveyed should thenceforth be held and enjoyed by the purchaser or purchasers thereof, freed and absolutely discharged from the trusts declared by the deed. In certain specified events power was also given to the trustees, or the major part of them, of their own proper authority, without any consent of the Conference, to sell the piece of land, chapel, and premises, discharged from the trusts. In either case the purchase-money was to be applied by the trustees in the manner mentioned in the deed. The chapel had been duly certified for the performance of religious worship in order to obtain exemption from poor-rate under the Act 3 & 4 Will. 4, c. 30.

Upon the hearing of a complaint, preferred by the district board, the magistrate of the Greenwich Police Court was of opinion that, on the construction of the above deeds, and having regard to the user of the premises, the trustees were owners, but that the chapel was not a house or land within the meaning of the statutes, and that therefore the trustees were not liable in respect of it, but he was of opinion that they were liable in

respect of the schools and the vacant land. He therefore decided that the trustees were liable to pay the 40*l.* 14*s.* in respect of the Albion Road, but that they were not liable to pay the 38*l.* 4*s.* in respect of that road, nor to pay the 25*l.* 18*s.* in respect of Bonfield Road.

The district board appealed as regarded the two sums disallowed, and the trustees appealed as regarded the 40*l.* 14*s.*

A case was stated by the magistrate, embodying the above facts, the questions of law stated for the opinion of the Court being, (1) whether the trustees were "owners" of the chapel, schools, and land within the meaning of the Acts of 1855 and 1862; (2) whether, if they were such owners, they were liable to pay such parts of the apportioned sums as were claimed in respect of the chapel in the two roads respectively.

The Divisional Court held that the trustees were liable in respect of the full amounts claimed by the district board.

The trustees appealed.

H. D. Greene, Q.C., and *S. J. Fraser Macleod*, for the appellants. The Divisional Court considered that the present case was concluded by *Caiger* v. *Vestry of St. Mary, Islington* (1), in which the trustees of a chapel, which had not been consecrated according to the rules of the Church of England, were held to be the owners of a "house" within the meaning of s. 105 (2) of

(1) 50 L. J. (M.C.) 59.

(2) Sect. 105 of the Act 18 & 19 Vict. c. 120, provides for the paving of a "new street" by the vestry or district board of the parish or district in which the street is situate, and that "the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board)."

Sect. 250 provides that in the construction of the Act "the word 'owner' shall" (with an exception not necessary to state) "mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

Sect. 77 of the Act, 25 & 26 Vict. c. 102, provides that where any vestry or district board shall, under the powers given by s. 105 of the former Act, have paved or be about to pave any new street, "the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, provided that it

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18 & 19 Vict. c. 120, or of "land" within the meaning of s. 77 of 25 & 26 Vict. c. 102, and therefore liable to contribute to the expense of forming and paving a new street on which the chapel abutted. It was, however, decided in *Angell* v. *Vestry of Paddington* (1) that a church abutting upon a new street was neither a "house" nor "land" within the meaning of these sections. If that decision was on the ground that the property was exempted from poor-rate by 3 & 4 Will. 4, c. 30, s. 1 (2), this chapel is equally within that exemption. In *Bowditch* v. *Wakefield Local Board of Health* (3) the Court distinguished the case from *Angell* v. *Vestry of Paddington* (1), Blackburn, J., saying (at p. 570) "the decision in the case of *Angell* v. *Paddington* (1) proceeded on the peculiar language of the statutes there in question; here" (where the statute was the Public Health Act, 1848), "'lands' and 'premises' include every description of property, and there is no exemption in favour of any class." And in *Higgins* v. *Harding* (4) the same learned judge said (at p. 10), "In *Angell* v. *Paddington* (1) I based my decision on the fact that the Church Building Commissioners could not be owners within the definition of the Act." *Angell* v. *Vestry of Paddington* (1) was correctly decided, and it was recognised by Lord Watson in *Great Eastern Ry. Co.* v. *Hackney District Board of Works* (5) as deciding "that a church abutting upon a new street, the site of which has been conveyed to the commissioners for building new churches, is neither a 'house' nor 'land' within

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shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses . . . . shall be apportioned by the vestry or board."

Sect. 112 provides that in the construction of the Acts the word "pave" "shall apply to and include the formation of the roadway or footway of any street."

(1) Law Rep. 3 Q. B. 714.

(2) By that section no person is to be "liable to be rated or to pay to any church or poor-rates or cesses for or in respect of any churches, district churches, chapels, meeting-houses, or premises, or such part thereof as shall be exclusively appropriated to public religious worship, and which (other than churches, district churches, and episcopal chapels of the Established Church) shall be duly certified for the performance of such religious worship according to the provisions of any Act or Acts now in force."

(3) Law Rep. 6 Q. B. 567.

(4) Law Rep. 8 Q. B. 7.

(5) 8 App. Cas. 687, 693.

the meaning of the Metropolis Management Acts." This chapel is not a "house" within the meaning of s. 105. In *Caiger* v. *Vestry of St. Mary, Islington* (1) Grove, J., said (at p. 63) that he did not agree that the term "house" must be confined to the popular use of the word, but he afterwards said that the decision in *Angell* v. *Vestry of Paddington* (2) was based on the fact that a church could not be used for the purposes for which a house is used. That applies equally to the present case. The trusts of the deed limit the use of the building to the purposes of religious worship. In *Caiger* v. *Vestry of St. Mary, Islington* (1) the building contained rooms which were used as a dwelling for the caretaker and his family. In *Pound* v. *Plumstead Board of Works* (3) it was held that "land" abutting on a new street included the soil of private roads leading out of the street; but in *Plumstead Board of Works* v. *British Land Co.* (4), it was held that the owners of the soil of roads, which had been irrevocably dedicated to the public, were not "owners of land" within the meaning of s. 77. In the latter case the view of Lord Coleridge, C.J., evidently was that a "house" for the purposes of these sections means a dwelling-house, and he says that by the two Acts the legislature pointed to house property and land property in the street. This chapel, therefore, is not a "house," nor is it "land," for land means land not built upon: per Quain, J., in *Higgins* v. *Harding.* (5) *School Board of London* v. *Vestry of St. Mary, Islington* (6) is distinguishable. If this chapel is either a "house" or "land," the trustees are not "owners" within the meaning of the section. Under the trust deed the trustees are as completely unable to deal with the chapel for any ordinary purposes of a house as a clergyman of the Church of England is unable to deal with his church, and moreover the lease under which they hold curtails their power of dealing with the property. A Court of Equity would restrain them from using the chapel for purposes inconsistent with their trust.

In *Robson* v. *Hyde* (7) it was held that "a private building,

(1) 50 L. J. (M.C.) 59.
(2) Law Rep. 3 Q. B. 714.
(3) Law Rep. 7 Q. B. 183.
(4) Law Rep. 10 Q. B. 203.
(5) Law Rep. 8 Q. B. at p. 10.
(6) 1 Q. B. D. 65.
(7) Caldecott's Reports, 310.

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always used as a chapel, and by contract never to be used for any other purpose, is, if a profit is made of it, rateable to the poor," but the ground of Lord Mansfield's judgment was, that at his pleasure the owner might apply the building to any other use. That is not so in the present case.

The cases as to liability to pay rates have no application, for the chapel is not liable to rates.

Meadows White, Q.C., and *Crump, Q.C.* for the district board. The question is, what is the true construction of the Acts? *Angell* v. *Vestry of Paddington* (1) is distinguishable, and at any rate it is not binding on this Court. What is the nature of the charge imposed by these sections? It is not like a poor-rate. Before a district authority can take over a new street and maintain it at the public expense, they are bound in duty to the ratepayers of the district, if it be not already paved to their satisfaction, to pave it properly at the expense of the owners of houses and land in the street: *Dryden* v. *Overseers of Putney*. (2)

If the owner of any part of the frontage is exempted from paying his proportion of the expense, an extra liability is thrown on the other owners of the frontage in the street. The exemptions ought not to be extended. After the street has been once properly paved, it may be that this chapel will be exempt from any rate for the purpose of repairing the pavement. Taking the two sections 105 and 77 together, primâ facie the owners of all land fronting on the new street, whether it is covered with houses or other buildings or is vacant, are liable to contribute to this expense. The apportionment is a matter within the discretion of the local authority. The words used in the sections ought to have their ordinary meaning, and this chapel is clearly either a "house" within s. 105, or "land" within s. 77. It is immaterial which it is. The trustees would clearly be owners within s. 77 of the Act of 1862 for the purposes of the building line. No doubt many of the words used in the Acts must have different meanings given to them according to the subject-matter of the sections in which they occur. There is nothing in the nature of this property which makes it unreasonable that it should contribute to this expense; it is for the benefit of the chapel that

(1) Law Rep. 3 Q. B. 714. (2) 1 Ex. D. 223.

there should be a good approach to it. A "house" is a building which gives shelter to anything—animate or inanimate. If, by dedicating this land to the public use, a man puts it for ever out of his power to make a profit by it, then the land is, as was said in *Great Eastern Ry. Co.* v. *Hackney District Board of Works* (1), "extra commercium." There Lord Watson said: "The authorities cited in the course of the argument appear to me to establish this proposition, that the person vested with the property of heritable subjects which have been placed "extra commercium," or are subject in perpetuity to the burden of a public right, which deprives him of their beneficial use, is not an owner of land within the meaning of the 77th section of the Act of 1862." In the case of a church of the Established Church of England the same result is produced by its consecration. In the present case the trusts might be put an end to by agreement, and even under the deed of trust the trustees could mortgage the chapel, and then the mortgagee might sell it and it might afterwards be used for any purpose. All houses and land which front on a new street, and which are not permanently dedicated to public uses, either by a private individual, or by the common law or a statute, are within these sections. In *Great Eastern Ry. Co.* v. *Hackney District Board of Works* (2), it was held that, in respect of the fence walls of a bridge carrying a highway over a railway, the railway company were not "owners of land bounding or abutting on" the highway within s. 77. There is nothing in the definition of the word "owners" in s. 250 to exclude these trustees. It was intended to include persons who occupy their own houses, and do not receive any rack-rent. The definition is in substance the same as that in s. 2 of the Public Health Act of 1848 (11 & 12 Vict. c. 63), and in *Bowditch* v. *Wakefield Local Board of Health* (3) it was held that trustees of a school, which they were prohibited by statute from letting, were "owners" of the school within that definition. In the case of a church of the Established Church there is no "owner," though the freehold may be vested in the parson.

H. D. Greene, Q.C., in reply. *Robson* v. *Hyde* (4) was a rating case.

(1) 8 App. Cas. 687, at p. 693.
(2) 8 App. Cas. 687.
(3) Law Rep. 6 Q. B. 567.
(4) Caldecott's Reports, 310.

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[BOWEN, L.J. There the question would be whether there was a beneficial occupier of a house or land.]

The definition of "owner" in s. 250 must refer to a letting which would not be restrained by a Court.

LORD ESHER, M.R. The question is whether the trustees of a Wesleyan chapel are bound to pay their proportion of the cost of forming and paving a new street in front of the building of which they are trustees. The question in a legal point of view is, whether they are such owners of such a building as are bound to contribute to such a payment for such a purpose under the statutes 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77?

The points which have been argued are: First. Is this chapel a house, or is it land, within the meaning of those statutes? and, secondly, if it is either a house or land, are the trustees such owners within the statutes as are bound to contribute to this expense? The premises consist of a chapel, a school-house, and a small piece of land. With regard to the school-house and the piece of land I have not, and I never had, any doubt at all as to their liability, and Mr. Greene, as I understand, has given that up. The real difficulty arises in respect of the chapel.

The case must depend after all upon the construction of the statutes. [His Lordship referred to ss. 105 and 250 of the first Act, and s. 77 of the second Act, and continued:—] Now the first question, and it is one the answer to which will go far to decide the case, is, whether, taking the two statutes together, the second being an Act to amend the first, and both having to be read together, this chapel is to be considered as either a "house" within s. 105 of the first statute, or "land" within s. 77 of the second statute. If it is either, then, subject to something else which I am about to say, it must be considered as a subject-matter within those sections. Now considering what is the subject-matter which is being dealt with,—a new street,—and that a liability is being imposed in respect of that new street on the properties which abut upon it on either side, it seems to me impossible to come to any other reasonable conclusion than that the legislature intended by the two Acts to deal with the whole frontage abutting

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on the whole length of the street, that they did not intend to omit any part of the frontage, and that, therefore, inasmuch as the whole frontage has to be exhausted, the two words "house" and "land" include the whole frontage, the whole length, of the street. Whatever fronts on the street must be either a "house" or "land" within the meaning of the two statutes taken together. This property, therefore, must be either a "house" or "land," and, whichever it is, it is a subject-matter within the enactment. But I think it would be hardly satisfactory, when we are called upon to construe an Act of Parliament, to stop there. I think we ought to state our view as to where the division arises between "house" and "land." Now, when the first statute stood alone, there might have been some doubt as to the intention of the legislature—whether "house" in that statute meant only a house in the ordinary colloquial sense of the term, or whether it was meant to include something more. But the mere passing of the second Act is a positive declaration by the legislature that they did not intend the word "house" to include everything abutting on the street; they clearly could not have intended it to include land which was not built upon at all. But it does not, therefore, follow that they did not intend the word "house" in the first Act to cover more than a house in the ordinary colloquial sense of the term, that is, a building constructed for a human habitation.

Having come to the conclusion that by the two Acts the legislature intended to exhaust the whole frontage of the street, it seems to me that you may use the second Act in order to discover the meaning which they intended to put upon the term "house" in the first Act. Did they mean that the word "land" in the second Act should include only land wholly uncovered with buildings, and that the word "house" in the first Act should include everything which was not land wholly uncovered? or did they mean that the word "house" should include only a house in the colloquial sense of the term, and that "land" should include, not only land uncovered with buildings, but land covered with every building which is not a house in the ordinary colloquial sense. They might mean either. Let us see what the result would be. If "house" in the first Act means only that

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which in ordinary colloquial language is a house, then, as the whole frontage is included under the two words "house" and "land," the word "land" would include land covered with any building which is not a house in the ordinary colloquial sense. Under "land" would be included such things as a large factory, a large manufactory for carriages, or a large brewery, in which people do not live and s. 77 would enable the local authority to charge such property as that in a less proportion than a mere house. That would be a strange conclusion, for property of that kind is often far more valuable than an inhabited or habitable house, and there would be power to charge that more valuable property at a less proportionate rate than the ordinary houses. I cannot think that that was intended, and it seems to me therefore that the second Act shews that the word "house" in the first Act was not meant to be confined to a house in the ordinary colloquial sense of the term, but that it includes something more.

But then comes the question, could the word "house" have been intended to include all land upon which there is some building or other? That, as it seems to me, would be an outrage on the English language. It could not mean a pig-sty. No mortal Englishman would suppose that the word "house" meant a pig-sty. It could not apply to an open shed used to cover a hay-rick or farm carts. No one would ever think of calling that a house in any use of the word however large. Could it be intended to include a green-house, which has a glass top, and is only used for the purpose of sheltering plants? Certainly not. Therefore, although it includes more than a house in the colloquial sense, it does not include all land upon which there is some building or other. It includes more than the one, and less than the other. What is the proper definition? To my mind it is reasonable to say that it includes all land upon which there is a building which is, or may be, used for the habitation of man. If that be so, the word "house" would, if there were no other difficulty in the way, include such buildings as churches, and it certainly must include such a chapel as this.

Then comes the question, is there any exception from this definition? It certainly seems to me that there is an exception, and, whether the exception arises from this part of the statutes or

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from another, it is not very important to decide, yet it is better to have one's mind clear. It may be true that the legislature have shewn that they intend that that which would otherwise be a house is not to be considered a house within the meaning of these Acts, if by law it never can be used as a human habitation, although structurally it might be so used. I am prepared to adopt that view and to say, looking at the whole of these Acts, that the legislature did not intend that a building, which, though structurally it could be used as a human habitation, yet by the law, so long as that law exists, never can under any circumstances be so used, should be considered a "house" within the meaning of these Acts. Now we know that by the common law (not by statute law) a consecrated church cannot be ever used as a habitation for man. That shews that it is not to be considered a "house" within the meaning of these Acts. And I cannot doubt that, if a statute puts a building of any kind in the same position in this respect as a church, the same consequence must follow. There is no difference between a statute law and the common law as to its effect the moment a statute is passed, and therefore if a statute so deals with a building that, so long as the statute lasts (for you are never entitled to assume that a statute will be repealed) the building never can be used for a human habitation, then by the statute the building is put in the same position as a church is by the common law, and it seems to me to follow that it was never intended to be treated as a "house" within the meaning of these statutes. One reason why I gather this intention from the statute, is because of the enactment as to the "owners" on whom this liability can be imposed. Now who are the owners who can be made liable? Sect. 250 of the Act 18 & 19 Vict. c. 120, says that the word "owner" shall, with certain exceptions which do not apply, mean (not include) "the person for the time being receiving the rack-rent of the land or premises"—(I do not rely on the words "lands or premises")—"in connection with which the said word is used, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." It is not, if such lands *were capable* of being let at a rack-rent, but, if such lands *were let* at a rack-rent. To my mind it is

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obvious that these words cannot be intended to apply to premises which in the contemplation of the law never can be let at all at a rack-rent. By the law no church of the Church of England ever can be let at a rack-rent. It cannot be let at a rent at all. Therefore, there never can be with regard to a church such an owner as is described here, and it follows that with regard to a church there is no person who can be made liable as an owner. This appears to me to shew that a church was not intended to be a "house" or "land" within these Acts.

If by statute a house, or a building, or land is put into the same position in this respect as a church, that is, put into such a category that it never can, so long as that statute lasts, be let at all at a rack-rent, there never can be the "owner" described in the 250th section, and it follows, as it seems to me, that that structure or land cannot be the structure or the land which is intended to be included in these Acts. So that, looking at the whole of the Act, I come to the conclusion that a church, which never can be let, although structurally it may be capable of being used for a human habitation, and certainly could easily be adapted to that use, is not a "house" within the intention of these Acts, and any other building which is placed in the same position as a church in that respect is not such a building as is intended by these Acts, and there can be no "owner" of it within the meaning of s. 250, even if it could be considered a "house," and s. 250 seems to me to apply to land on which there is no structure just as much as to a house.

This being so, we have next to consider whether this particular chapel is put into the same category with a church or other buildings of the kind to which I have referred. It is certainly not true that by the common law, or by the ecclesiastical law, this chapel cannot be used as a human habitation; nobody has suggested that. Nor can it be said that it is put into that category by an Act of Parliament which we have no right to assume will be repealed. It is put into this position (so I will assume), not by Act of Parliament, but by deeds of conveyance and trust, so that as long as those trusts last these trustees could not let it at a rack-rent. I will assume that; I care not to inquire whether that is the true construction of the deeds. But,

assuming that to be so, it is clear to my mind that that is not the same thing as saying that by the common law of the land, or by statute, the building never can be applied to other uses. It may be that to-morrow, or the next day, or the next month (even assuming that the trustees cannot deal with it now as the thing stands) by agreement between the trustees, the cestuis que trustent, and the lessors (whoever the cestuis que trustent may be), the state of things under these deeds and trusts may be put an end to, and the property may be used for the purpose of a human habitation, or in any other way. Therefore the question is, whether under such circumstances this chapel is brought into the same category as a church or a building which is dealt with by Act of Parliament, and it seems to me that it certainly is not. That makes the whole difference, and this appears to have been the view of Lord Mansfield in *Robson* v. *Hyde*. (1) He said (p. 314): "It is said indeed that he is restrained from doing this by covenant, but the restriction by covenant does not vary the nature of the property." The common law of England has varied the nature of the property in the case of a church; the statute law has varied the nature of the property in the case of buildings which are by statute put into the same position as a church as to the possibility of letting them. These covenants are no more than agreements between the parties for breach of which some remedy will be given at law. They do not vary the nature of the property, because they may at any moment be put an end to by the consent of the parties interested. I agree with the decision of Lord Mansfield, and therefore I hold that this chapel is within the subject-matter dealt with by these Acts, and that the trustees are such owners as are liable to contribute to these expenses. In my opinion, therefore, the decision of the Divisional Court is right, and must be affirmed.

In coming to this conclusion I think we shall not be overruling any previous decision. We do not overrule *Angell* v. *Vestry of Paddington* (2); that decision remains untouched, and so, I think, does *Bowditch* v. *Wakefield Local Board of Health*. (3) *Great Eastern Ry. Co.* v. *Hackney Board of Works* (4), whatever

(1) Caldecott's Reports, 310.
(2) Law Rep. 3 Q. B. 714.
(3) Law Rep. 6 Q. B. 567.
(4) 8 App. Cas. 687.

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may be the meaning of the judgment of the House of Lords, which I do not at present fully comprehend, cannot have anything to do with the present case. If we had decided otherwise we should have been overruling *Caiger* v. *Vestry of St. Mary's, Islington.* (1) We do not interfere in any way with *Plumstead Board of Works* v. *British Land Co.* (2) We do not overrule any previous decision, but we give a wider interpretation to the word "house" than has been suggested by several learned judges, certainly by Lord Coleridge. The fair meaning of the Acts is, I think, that which I have expressed. I have expressed my view with regard to the limitation between the words "house" and "land," not for the purpose of deciding this case, because it was not absolutely necessary to do so, but because I think it better to give my view of the meaning of the Act now that it has been so fully discussed before us, inasmuch as our decision may be a guide to overseers and other persons who are interested in the mode of dealing with properties which are liable to contribute to such expenses as this.

COTTON, L.J. We have two questions to determine, (1) whether the appellants, who are the trustees of this chapel and school, are "owners" within the meaning of the first Act, (2) whether that of which they are owners is a "house" or "land" within the meaning of the two Acts.

Before entering into these points I may observe that it is not a question of rating, but the question is whether, under the 105th section of the first Act and the 77th section of the second Act, power is given to the district board to charge the appellants with the cost, or part of the cost, of forming and paving a new street. That is an entirely different question from one of rating. When a new street is to be paved and put into the state in which it ought to be as a roadway, the legislature contemplated that primarily this would be for the benefit of the owners of that which is described as "houses" and "land" forming and abutting on the new street. Therefore it is entirely a different question from the question whether rates can be raised for the general purposes of the board, purposes which will include matters which

(1) 50 L. J. (M.C.) 59. (2) Law Rep. 10 Q. B. 203.

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are not covered by the powers given by ss. 105 and 77 to charge the adjoining owners with the expense.

Now, the 105th section of the first Act says that the owners of "houses" are to be charged, and, that apparently not being considered sufficient, s. 77 of the second Act says that the owners of "land," as well as the owners of houses, are to be charged. The houses in the first Act are referred to as "the houses forming such street," and the second Act speaks of "the land bounding or abutting on the street." I cannot doubt that by those sections taken together the legislature intended to include the entire frontage on each side of the street. In the first Act only houses are referred to, the legislature probably forgetting that in new streets there might still be portions of the frontage not covered with houses, and therefore the later section was added in order to bring in and include as "land" that which was not included in the previous section. It really means that houses come under the one description, and anything other than houses comes under the other description of "land." Of course a house is not land, but "land" will include land covered with houses or buildings, as well as land not so covered. If the words "houses" and "land" are used in opposition to each other, the word "land" will include land which is covered with buildings not in the nature of houses.

To my mind it would be quite sufficient to decide the present case to say, as I should do without any hesitation, that the buildings which are vested in these trustees, if they are not "houses," are "land" within the meaning of these Acts. But I agree with the Master of the Rolls that, as the matter has been fully discussed before us, it is better to express our opinion whether they are "houses" or "land." I must dissent from the view which has been taken by some judges that, in construing these sections of the Acts, we ought to restrict the word "houses" to houses ordinarily so called. It may be that in other sections that is the proper construction, because "houses" are there found contrasted with "buildings." But here, in my opinion, there is nothing to shew that the word "houses" is to have that restricted sense, and we must see what is the fair meaning of the two sections taken together. I quite agree with the Master of the

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Rolls that a pigsty, or an open cartshed, or a cowhouse, is not a house within the meaning of these sections; land covered only with buildings of that kind would come under the description of "land," not "houses." But we have to consider and decide whether this chapel and these school buildings are "houses" within the meaning of s. 105. In my opinion they are. Lord Mansfield lays down a very useful rule in *Robson* v. *Hyde* (1) (it is not of course a decision on these statutes, but on rating); he says that you must not have regard to or be led entirely by the present use of property, when it is only a temporary use by virtue of a contract which may be altered by the contracting parties, if they please, without any breach of law. What is the case here? As regards the school buildings it can hardly be doubted that they are "houses." The school is apparently only used as such on Sunday, and there is nothing in its structure, or in the trust on which it is held, to prevent its being used as a house in the ordinary sense of the word when it is not being used for the purposes of a school. And, although the school buildings are vested in trustees, and are held by them under a lease which prevents them from alienating without the consent of the landlord, yet, with the consent of the landlord, they may alienate, and under the deed of trust they can apparently, without any consent of the Wesleyan Conference, let the buildings, and there is a direction as to how they are to divide the rent. In my opinion there is no force in the argument that those buildings are not "houses" within the meaning of the Act. Nor can it be said that the trustees are not "owners" within the definition of s. 250. They do not receive any rack-rent now, so far as we know, but they are the persons who would receive the rack-rent of the buildings if they were let, as they are capable of being.

As regards the chapel it is no doubt a more difficult question. It is a structure which is perfectly capable by means of internal alterations of being made fit for the habitation of man, and there is nothing in the general law which prevents it from being so used to-morrow. And, in my opinion, there is nothing in the trust which permanently and necessarily prevents it from being so used, because, although it is vested in the trustees for the purpose

(1) Caldecott's Rep. 310.

of being used while it is in their hands only for the celebration of religious services in the form adopted by the Wesleyans, yet there is power in the deed of trust to sell it, with the approval, it is true, of the Conference, and, if it was sold, there would be nothing to prevent it from being turned to any useful purpose for which it could be adapted; it might be, and it is capable of being, turned into a habitation for man, and, even without selling it, the trustees have power to mortgage it, and if the mortgagees should take possession, what is there to prevent them from converting it to any use other than that which is prescribed by the trust deed so long as it does not pass into the hands of mortgagees or purchasers. In my opinion this chapel is a building which as regards its structure comes within the meaning of the word "house" in the Act, and there is nothing in law which necessarily prevents it from being applied to purposes other than those to which it is now applied under the trust deed. In my opinion, therefore, it is a "house." But it is not necessary for the decision of the present case to say this, because, in my view, if this building is not a house, the site of it would come within clause 77 of the later Act as "land."

What I have said entirely distinguishes this case from *Angell* v. *Vestry of Paddington* (1), which has been supposed to conflict with *Caiger* v. *Vestry of St. Mary, Islington.* (2) I do not think the two cases are at all in conflict. In *Angell* v. *Vestry of Paddington* (1) the question arose with regard to a church of the Established Church of England, which was vested in the Commissioners for building additional churches. It is true we are ignorant of the precise grounds on which that case was decided, because we find two of the judges who decided it referring to it subsequently as having been based upon different considerations, and at the time no detailed reasons were given for the judgment. And that case may certainly be distinguished from *Caiger* v. *Vestry of St. Mary, Islington* (2) on two grounds: (1.) that the Commissioners could not be "owners;" and (2.) that by the common law the church could not be considered as either a "house" or "land" within the meaning of the Metropolis Local Management Acts.

(1) Law Rep. 3 Q. B. 714. (2) 50 L. J. (M.C.) 59.

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Now are these trustees the "owners" of the chapel? That question is practically decided by a reference to the trust under which it is held, but I do not think it is necessary to say whether the property must be capable of being let at a rack-rent in order that they should be owners. There are some expressions in *Bowditch* v. *Wakefield Local Board of Health* (1), which seem to shew that the judges thought that the definition of "owners," as the persons who received or would receive the rack-rent of the property, was intended only to exclude those who had parted with the property in such a way that, if it was let at a rack-rent, they would not receive the rent. But whether that be so or not is, in my opinion, immaterial, for, if the present case turns upon whether the chapel could be let at a rack-rent, we must still decide that point against the appellants. In my opinion, therefore, as regards all these buildings, the appeal fails.

BOWEN, L.J. Two questions have been discussed, first, whether the trustees are "owners" within s. 250 of the Act of 1855; secondly, whether this chapel, and the school and yard attached to it, is a "house" within s. 105 of that Act, or, if not a "house," whether it is "land" within s. 77 of the Act of 1862.

I will address myself first to the second question, which has been argued at the greatest length, and which, I think, is one which we cannot possibly pass by without expressing a judicial opinion upon it, more especially as it is in my view the strongest and most solid ground which we can take for our judgment—I mean whether this chapel is a "house." We must of course define within certain limits the meaning of the word "house" in s. 105, and, to my mind, the meaning is to be derived from reading the Act by itself, and seeing how the legislature intended in that particular section to employ the term. In this Act various popular terms are employed in various sections, and sometimes with different meanings. The terms "street" and "house" are used in a popular sense in various sections. The first thing, therefore, to be done is to consider what is the subject-matter with which the legislature are dealing in s. 105. They are dealing with the construction of a new street, and considering how far

(1) Law Rep. 6 Q. B. 567.

the expense of constructing it ought to be imposed on those who will benefit by it. They have, therefore, under their view the occupation of buildings fronting a street, which is likely to be rendered directly or indirectly more convenient by the user of the pavement of the street, and they direct that the assessment is to be made on the "owners of the houses" forming the new street. The legislature have not used the term "building"; they have used the term "house," which is a popular word, and the reflection at once suggests itself that they cannot be intending to confine the term "house" to the mere present user of any particular building as a house, because that would exclude the unoccupied houses of which a new street would probably be to a large extent composed. You cannot therefore look at the actual occupation and user for the moment; you must look beyond that. You must not look only at the temporary or ephemeral use to which at a particular moment a building is being put, because that use may be changed at any time, and it certainly could not have been intended that a building should escape from liability to this assessment because its owner at a particular moment preferred not to treat it then as the subject-matter of occupation as a house. To my mind the true view is that a "house," within the meaning of this section, is a building which is capable of being used as a dwelling-house, that is, a dwelling for man. There may be two obstacles which render a building incapable of being so used. First, it may be physically incapable of being reasonably so used on account of its construction. Neither the Duke of York's column, nor a tombstone, nor an open shed, nor the Prince Consort's Memorial, could by any fit use of language be said to be capable of being used as a dwelling for man. This is a physical incapacity. But, secondly, there may be a legal incapacity preventing a building from being used as a dwelling for man, an incapacity existing either at common law or by statute. An instance of legal incapacity is afforded by a church of the Established Church of England. By the consecration of such a church the status of the building and of the soil is altered. The building is by the ecclesiastical law separated for ever from the common uses of mankind. It is dedicated thenceforward to sacred services, and the law precludes it from being ever capable of use for

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ordinary secular purposes. It may be said that it is a hard thing to draw a distinction between a chapel and a church in this respect, but the answer is that we have only to apply the law. The consecration of a church, according to the law of this country from time immemorial, has placed the consecrated building out of the pale of ordinary buildings. So much for the principle of the exception of a church from this liability. As to the authorities, I read *Angell* v. *Vestry of Paddington* (1) as deciding that a church is neither a "house" nor "land," within the meaning of these Acts, because that is the precise language used by Cockburn, C.J., in his judgment, although Blackburn, J., in concurring, added that he could not see how the Commissioners for building additional churches could be said to be "owners" within the definition of the statutes. I do not mean to say that it is only a decision that a church is neither a "house" nor "land," but that it decides this as well as other matters was the construction put on it by Lord Watson in *Great Eastern Ry. Co.* v. *Hackney District Board of Works.* (2) This view, deduced from principle and authority, is also consistent with, if it does not derive support from, the interpretation clause (s. 250), because a building which is struck with a legal incapacity of ever being used as a house is hardly one of which there can be an owner who lets it at a rack-rent. This legal incapacity can, I think, be also created by statute, but it is an essential ingredient of the incapacity that it should affect the nature of the property. But when you come to a building which, physically and by the law of the land is perfectly capable of being used as a house, but is only prevented from being so used by conventional restrictions to which the persons interested in its user have agreed, it cannot be said to be stamped with any physical or legal incapacity for such a use. At any moment those persons might, if they chose, either release the obligations, or countenance or connive at their infringement. In such a case the status of the property is not affected, but it falls within the distinction pointed out by Lord Mansfield in *Robson* v. *Hyde* (3), where he was dealing with the case of a chapel. It is true that was not a decision on the Metropolis

(1) Law Rep. 3 Q. B. 714. (2) 8 App. Cas. at p. 693.
(3) Caldecott's Rep. 310.

Local Management Acts, but on the Rating Acts, and that the only thing which can be said to have been laid down authoritatively by Lord Mansfield is that the occupier of a chapel was the occupier of a house or land within the rating statutes. But Lord Mansfield's reasoning may be invoked with advantage and applied to the circumstances of the present case. He said (1), "The doubt in this case can only have arisen from the use of the word 'chapel;' but this building is not a chapel in an ecclesiastical sense. It is not a consecrated place, the ecclesiastical law cannot take notice of it. It is a mere private room, let out it is true at present for the purposes of religious worship, but which at his pleasure the owner may apply to any other use. It is said, indeed, that he is restrained from doing this by covenant; but the restriction by covenant does not vary the nature of the property." So it seems to me that this chapel, although its uses are restricted by agreement between the persons to whom it belongs, is a building capable of being used as a "house," as I have defined it, and à fortiori that the school and yard attached to it are capable of such user. This, I think, is the strong ground of our decision.

But I also entirely agree that if it is not a "house," it is "land" within the meaning of the later Act. If it is not a "house" I do not see how you can avoid withdrawing from the operation of the term "house" in s. 105 large buildings, like factories and many other buildings occupied for certain specific purposes, and, unless buildings of that kind come within the term "land" in s. 77 of the Act of 1862, there would be this extraordinary result, that, for the purpose of forming and paving a new street, the local authority would be able to assess houses, or a market garden, or a waste piece of land, but would be unable to assess a factory or other building which was making twenty times the use of the street, and enjoying twenty times the convenience, that any house in the street was doing. I think it is clear that the interpretation given to s. 77 by the other members of the Court is correct, and that, if this chapel is not a "house," it is "land," the word "land" being used in contradistinction to "house," and including land covered with buildings which are not "houses."

(1) Caldecott's Rep. 314.

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There remains the question whether the trustees are "owners" of the chapel within the meaning of s. 250, and it seems to me that they are. They are the persons who would receive the rack-rent, if the property was let at a rack-rent. It was said by Mr. Greene in his extremely ingenious argument that this chapel never could be let at a rack-rent without violation of the terms of the deed. But s. 250 does not confine the term "owner" to those persons who could receive a rack-rent from the particular premises, or who could let them at a rack-rent; it includes those persons who would receive the rack-rent if the premises were let at such a rent, and I think *Bowditch* v. *Wakefield Local Board of Health* (1) is a conclusive authority, if authority were wanted, to shew that a man is not the less the "owner" of premises, because, by the provisions of the deed under which he holds them, they cannot, so long as he holds them, be let at a rack-rent. Whether in the case of premises which were prevented by an Act of Parliament from being let at a rack-rent, there ever could be an "owner" within the meaning of s. 250, I very much doubt. I am inclined to think that, if the incapacity to be let were stamped on the premises, they never could have an "owner" within the meaning of s. 250. But that is not the present case. I think the trustees of this chapel, and still more of the school and yard, fall within the definition of "owners" in s. 250.

For these reasons I am of opinion that the decision of the Court below was right. I think that *Caiger* v. *Vestry of St. Mary's, Islington* (2) was rightly decided, and I do not think that, in coming to the conclusion at which we have arrived, we interfere with *Angell* v. *Vestry of Paddington* (3), or with the decision of the House of Lords in *Great Eastern Railway Co.* v. *Hackney District Board of Works* (4), or with any other case.

Appeal dismissed.

Solicitors for appellants: *Ingle, Cooper, & Holmes.*
Solicitor for District Board: *H. S. Winnett.*

(1) Law Rep. 6 Q. B. 567.
(2) 50 L. J. (M.C.) 59.
(3) Law Rep. 3 Q. B. 714.
(4) 8 App. Cas. 687.

W. L. C.

THE MAYOR, &c., OF ST. HELEN'S *v.* KIRKHAM. 1885 Dec. 21.

Local Improvement Act—Apportionment of Cost of paving, &c., new Streets—Definition of "Owner"—Agent for collection of Rents—32 & 33 Vict. c. cxx., ss. 4, 98, 99.

By ss. 98 and 99 of the St. Helen's Improvement Act, 1869 (32 & 33 Vict. c. cxx.), the corporation of St. Helen's are, upon failure of the owners of property fronting on a new street to drain, pave, &c., the roadway and paths pursuant to an order, impowered to do the work themselves, and to charge the expenses thereby incurred upon such owners in proportion to their respective frontages; and by the interpretation-clause, s. 4, "owner" is declared to mean "the person for the time being receiving the rack-rent of the lands in connection with which the said word is used, whether on his own account or under or by virtue of any mortgage or charge, or as agent or trustee for any other person, . . . and shall include every successive owner from time to time of such land for any part of the time during which the enactment wherein that term is used operates in relation to such land:"—

Held, that an "agent" employed to collect the rents of the property charged by the apportionment is an "owner" within the Act, and is liable to be called upon to pay, whether he has money of his principal in hand or not, at any time whilst the sum assessed upon the premises remains unpaid.

THE statement of claim indorsed on the writ was as follows:—

The plaintiffs' claim is for 87*l.* 5*s.* 9*d.*, being the proportion payable by the defendant of the cost incurred by the plaintiffs in the sewering, draining, levelling, flagging, paving, and otherwise completing of Cyril Street, in the borough of St. Helen's, in respect of frontage of buildings and lands in the said street, of which the defendant is the owner within the meaning of the St. Helen's Improvement Act, 1869. (1) The particulars shewed a claim for 120*l.* 18*s.* 2*d.*, being the amount of the apportionment on the property in respect of the paving, &c., of 163 feet 6 in. of frontage, with interest, deducting 33*l.* 12*s.* 5*d.* for payments on account made between the 29th of August, 1881, and June the 6th, 1882; leaving the balance claimed, of 87*l.* 5*s.* 9*d.*

The defence in substance was that the defendant was not and never was owner of the buildings and lands, within the intent and meaning of the St. Helen's Improvement Act, 1869; that he had no interest in the premises except receiving the rents as agent for another person; and that he had not when the notice and demand were given to and made upon him nor had he at any time

(1) 32 & 33 Vict. c. cxx.

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since received, nor had he now, any rent in his hands received as agent or otherwise in respect of the premises, out of which he could or ought to have paid the money claimed, or any part thereof.

In the year 1881, the corporation of St. Helen's, in pursuance of the 98th section of the Improvement Act of 1869, made an order upon the owners of houses and lands fronting Cyril Street to sewer, drain, level, flag, pave, &c., the footpaths and roadway opposite their respective premises within a given time, and, upon their failure to comply with the order, proceeded, under s. 99 (1), to perform the necessary works themselves, and made an apportionment upon the several owners to reimburse themselves the cost thereof. At the time the order was made and the work done, one Crookes was the owner of the premises in respect of which the sum now sought to be recovered was assessed or apportioned.

In June, 1881, by a resolution of the corporation under s. 396 of the Act (2), the sum charged upon Crookes (120*l.* 18*s.* 2*d.*) was

(1) Sect. 99 enacts that "if any work required to be done by such order [as in s. 98] is not commenced within one month after the last publication of such order, or if any such work when commenced is not carried on without unreasonable delay, or if any such work be not completed within the time and in the manner prescribed in the order, the following provisions shall apply, viz.

"1. The corporation may do the work in such manner as they think fit.

"2. The corporation may charge the several owners of buildings or lands in such street, &c., with the expenses of or incidental to the execution of such works, together with a commission not exceeding the rate of 5*l.* per cent. on the amount of such expenses ("new street expenses") in respect of the cost to the corporation of surveying and superintendence of such works.

"3. New street expenses shall be charged to such owners in proportion to the extent of the frontage of their respective buildings and lands in the street or court, or in such other proportion as the corporation shall think equitable.

"4. Such proportion shall be ascertained and settled by the corporation, and such apportionment by the corporation shall be binding and conclusive on all parties unless the same is by written notice disputed within one month from the time of notice being given by the corporation of such apportionment.

"5. Any such dispute shall be settled by arbitration."

(2) Sect. 396 impowers the corporation "by resolution to allow to the owners or occupiers, or any of them, time for the re-payment thereof [that is, the amount apportioned], or any part thereof, and may order the same or any part thereof to be re-paid either in one sum or by such instalments as the corporation think fit; . . . but all sums so remaining due, notwithstanding that the corporation so agree to allow time, shall from time to time at the expiration of the several times allowed be recoverable from the respective owners and occupiers for the

allowed to be paid by quarterly instalments of 7*l.* 2*s.* 8*d.* In the years 1881 and 1882 Crookes paid four of these instalments, amounting in the whole to 33*l.* 12*s.* 5*d.*, leaving a balance due to the corporation of 87*l.* 5*s.* 9*d.*

From June 30th, 1883, down to the time of bringing this action, the defendant as agent for Crookes had collected the rents of the property, and had actually received rents to the extent of about 135*l.* The corporation thereupon sought to charge him as "owner" within the meaning of the Act of Parliament.

The cause was tried before Lopes, J., at the last assizes at Liverpool, and was subsequently argued before him upon further consideration.

French, Q.C. (*M. Swift*, with him), for the plaintiffs, contended that the defendant, being an *agent* in receipt of the rents of the buildings and land, was, by virtue of the 396th section of the local Act taken in connection with the interpretation-clause, s. 4, which enacts that "the word *owner* shall mean the person for the time being receiving the rack-rent of the lands in connection with which the said word is used, whether on his own account or under or by virtue of any mortgage or charge, or as *agent* or trustee for any other person, or who would so receive the same if such land or premises were let at a rack-rent, and shall include every successive owner from time to time of such land for any part of the time during which the enactment wherein that term is used operates in relation to such land," liable for the unpaid balance of the apportionment under s. 99, as if he were the actual owner of the property charged. The words of the Act are perfectly clear. The apportionment in effect becomes a charge upon the land. Having once attached, the charge remains a subsisting charge, which can only be got rid of by payment. Two cases have been reported upon the analogous section of the Public Health Act, 1875 (1), viz. *Eddleston* v. *Francis* (2) and *Peek* v. *Waterloo Board of Health* (3), in the former of which the question was raised but not decided, whether a receiver appointed by the

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time being, *both present and future, in succession one after another*, as the same would have been recoverable from the original owner or occupier if no such time had been allowed."

(1) 38 & 39 Vict. c. 55, s. 4.

(2) 7 C. B. (N.S.) 568.

(3) 2 H. & C. 709.

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Court of Chancery was an "owner," and in the latter it was held that a person de facto receiving the rent came within the definition, though not at the time entitled to it de jure. But the interpretation-clause of that Act does not contain the large and comprehensive expressions which are found in the Act now under consideration.

Joseph Walton, for the defendant. This difficulty could not arise under the Public Health Act, 1875. Under that Act the apportionment for new street expenses is made a charge upon the land (1): it is not so under this Act. The question here is, whether an agent who receives the rents of the premises is the "owner" within the meaning of the interpretation-clause, s. 4 of the local Act, and personally liable to pay the amount of the apportionment, even though appointed agent after the time when the money was expended by the corporation; or, in other words, whether successive agents are to be treated as successive owners within s. 396. It may be reasonable that the person who as agent receives the rents at the time of the apportionment should be called upon to pay so long as he continues agent; but not that one who is appointed agent long afterwards, and who has no power, like tenants for life or committees of lunatics under s. 397 (2), to raise the amount by mortgage of the lands, should be so called upon: and, if a rational construction tending to a more reasonable conclusion can be given to the words of s. 4, such interpretation should be adopted. It would seem to be absurd and unjust that one who is appointed agent to collect the rents after the making of the apportionment should be called upon to pay money out of his own pocket, when he has no means of recouping himself, or even though the premises are unlet.

[LOPES, L.J. Is it so absurd or unjust? The object aimed at is, to secure to the corporation by every possible means the

(1) Sect. 257.

(2) That section enacts that "all owners of buildings or lands, being tenants for life only, and all committees of lunatics, and all trustees seised, possessed of, or entitled to any estate or interest, either at law or equity, in any buildings or lands for or on behalf of any person or charity, may charge such buildings or lands with such sum as may be necessary to defray the whole or any part of the expenses which the owners of such buildings or lands for the time being are liable to pay, and the expenses of making such charge; and for securing the repayment of such sum, with interest, may mortgage such buildings or lands to any person advancing such sum."

repayment of the moneys expended by them in making up new streets. It may be difficult to get at the actual "owner:" he may be abroad. Besides, the person who collects the rents may always secure himself by arrangement with his principal.]

It may be just that the agent for the time being who is in receipt of the rents, or who has actually received them to an extent sufficient to enable him to satisfy the charge, should be called upon to pay; but not "successive agents."

French, Q.C., was heard in reply.

LOPES, J. The facts here are not disputed. The question turns upon the meaning of the interpretation-clause, s. 4, of the local Act. Mr. Walton admits that the defendant, if owner of the premises in question, would be liable to pay the amount sought to be recovered: but he contends that as agent to receive the rents he is not liable, for that the agent contemplated by s. 4 must be a person who was such agent at the time of the making of the apportionment, and not one who only becomes agent at a future time. I cannot adopt that argument. The words of the interpretation-clause seem to me to be perfectly clear; and I see nothing incongruous or unreasonable in imputing to them the meaning I am about to do. "The word 'owner' shall mean the person for the time being receiving the rack-rent of the lands in connection with which the said word is used, whether on his own account or under or by virtue of any mortgage or charge, or *as agent* or trustee for any other person, or who would so receive the same if such land or premises were let at a rack-rent, and shall include every *successive owner* for the time being of such land for any part of the time during which the enactment wherein that term is used operates in relation to such land." It would seem, therefore, that "owner" includes the agent whether he receives the rent or not, and whether the premises are let or not. And I think it includes the person who is agent at the time when the corporation are seeking to enforce payment of the amount.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Gregory, Rowcliffes, Rawle, & Johnstone, for T. Brewis, St. Helen's.*

Solicitors for defendant: *Norris & Norris.* J. S.

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[IN THE COURT OF APPEAL.]

THE ATTORNEY GENERAL *v.* THE MARQUIS OF AILESBURY AND OTHERS.

Revenue—Probate Duty—Lunatic—Accumulations of Personal Estate—Investment in Realty—Conversion.

In certain instances where in a Court of Equity land is considered to be of the nature of personal, and not of real, estate, it may for the purposes of probate duty be treated and dealt with as part of the estate and effects of the deceased owner, in respect whereof administration is granted to his personal representatives, and whereupon probate duty is payable: but land can be so treated and dealt with only where it is part of the assets of a partnership, or where the deceased owner has contracted to sell it, or where it is subject to an imperative trust for sale to be executed independently of his consent, or where an order of a Court of competent jurisdiction has directed it to be sold, and has caused its direction to be carried out by inserting apt words of conveyancing in the necessary deeds and documents, the intended sale in each of the three last-mentioned instances having been such that it might have been carried out in the owner's lifetime; for where the sale either is dependent upon the consent of the owner during his lifetime, or can be carried out only after his death, the land for the purposes of probate duty must be deemed to be of the nature of real, and not personal, estate: the state of matters and the rights existing at the moment of the owner's death must be considered and taken into account, in order to ascertain whether probate duty is payable.

The committees of a lunatic, acting under certain orders of the Lords Justices of Appeal sitting in Lunacy, invested the accumulations of his personal estate in the purchase of land. In pursuance of, and in conformity with, these orders, certain lands (the price for which was paid out of the accumulations of the lunatic's personal estate,) were conveyed "unto and to the use of the" committees, "their heirs and assigns, for ever, upon trust for" the lunatic, "his executors, administrators, and assigns;" and certain powers of leasing and sale were given to the committees; and the deeds of conveyance contained a declaration that the lands thus bought should be considered as part of the personal estate of the lunatic, but they contained in terms no trust for sale:—

Held, that the value of the lands thus bought was not part of the lunatic's personal estate and effects at his decease, and was not liable to probate duty as part of the estate and effects, in respect of which administration might be granted to his personal representatives.

Judgment of the Queen's Bench Division (14 Q. B. D. 895) reversed.

INFORMATION to recover duty payable under the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), in respect of certain investments representing portions of the personal estate and effects of Sir Henry Meux, deceased, of whose will the defendants were executors.

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By an inquisition dated the 17th of June, 1858, under an order of the Lords Justices of Appeal sitting in Lunacy, Sir Henry Meux was found to be of unsound mind. He continued of unsound mind until his death, and his estate was managed and administered by committees, appointed by and acting under the orders of the Lords Justices sitting in Lunacy. Large sums of money, part of the personal estate, accumulated in Court to the credit of the lunatic's estate, and these sums, with the sanction of the Lords Justices, were expended from time to time by the committees of the lunatic in the purchase of land.

The property purchased by the committees comprised certain lands and hereditaments situate in Hertfordshire, and certain other lands and hereditaments situate in Wiltshire. All the purchases were directed to be carried out by orders in Lunacy specially applied for on each occasion. In the first and third purchases of land by the committees the conveyances were, by the orders approving the purchases, directed to be made, and were in fact made, to the use of the committees, their heirs and assigns, upon trust to raise the amount of the purchase-money, and subject thereto upon trust for Sir Henry Meux, his heirs and assigns. In all the other purchases the conveyances were to the use of the committees, their heirs and assigns, in trust for Sir Henry Meux, his executors, administrators, and assigns, and there were declarations in each case that the premises granted were to all intents and purposes to be considered as part of the personal estate of Sir Henry Meux. The conveyances were drawn in conformity with the terms of the several orders of the Court sanctioning the respective investments, the intention (as the informant submitted) and the legal effect being that the nature and character of the property as part of the personal estate of Sir Henry Meux should not be in any way altered by the fact of the investments being made, and that it should remain personal estate of the lunatic at his death.

The following statement shews the material parts of the conveyances of the Wootton Bassett estate, and all the other conveyances (with the exception of the two above mentioned) were to the like purport and effect. The indenture recited an agreement

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for the purchase, subject to the approval of the Lord Chancellor, for the price of 225,000*l.*, exclusive of timber, of the manors, advowson, messuages, farms, lands, tenements, and hereditaments thereinafter described; an order and a certificate of one of the masters in lunacy, both made in the matter of the lunacy, appointing committees; an order on the petition of the committees that the masters in lunacy should settle and approve a proper conveyance of the estate comprised in the agreement to the petitioners or some other proper parties, in trust for Sir Henry Meux, his executors, administrators, and assigns, with a declaration that the estate was to be considered as part of the personal estate of Sir Henry Meux, and with powers of sale, exchange, and leasing, with the provision that during the continuance of the unsoundness of mind of Sir Henry Meux and until the proceedings in the matter should be superseded, such powers were not to be exercised without the approval of the Lord Chancellor or the Lords Justices of Her Majesty's Court of Appeal entrusted by virtue of the Queen's sign manual with the care and commitment of the custody of idiots and lunatics and their estates; that the masters in lunacy had settled and approved of those presents as a proper conveyance to be executed in pursuance of the last recited order, and an order that the agreement should be carried into effect on behalf of Sir Henry Meux; and the indenture witnessed that in pursuance and performance of the agreement and in consideration of the sums of 225,000*l.* and 7357*l.* 9*s.* 10*d.* sterling (being the price of timber), paid to the vendor out of a fund standing to the credit of the matter of Sir Henry Meux, Baronet, a person of unsound mind, and which fund formed part of the personal estate of Sir Henry Meux, the vendor conveyed the manor, lands, and hereditaments thereinafter particularly mentioned, with the appurtenances, unto and to the use of the committees their heirs and assigns, for ever, upon trust for Sir Henry Meux, his executors, administrators, and assigns; and certain powers of leasing and sale (with a direction to reinvest the proceeds of the sales in other lands and hereditaments,) were given to the trustees over the hereditaments conveyed; and it was thereby declared that the manors, advowsons,

hereditaments, and premises thereinbefore expressed to be thereby granted, were to all intents and purposes to be considered as part of the personal estate of Sir Henry Meux.

Sir Henry Meux died on the 1st of January, 1883. By his will dated the 8th of August, 1856, and a codicil dated the 3rd of July, 1857, he had made certain dispositions of his real estate, and also of his personal estate, and the will and codicil were duly proved by the defendants, the executors therein named. By his will Sir Henry Meux declared, amongst other things, that all accumulations which might accrue from his personal estate were to be invested in consols and other stocks, and were to be considered part of his residuary personal estate. By this will his eldest son was made residuary legatee of the personalty and devisee of the realty. Pursuant to the Customs and Inland Revenue Act, 1881, the defendants made an affidavit on applying for probate as to the amount of the personal estate, but in such affidavit they did not include the value of the hereinbefore mentioned investments, except the first and third, which they did include.

The information prayed that it might be declared that the value of the land and hereditaments, purchased as aforesaid with funds forming part of the personal estate of Sir Henry Meux, deceased, during his lunacy, by way of investment, was part of the personal estate and effects of Sir Henry Meux, deceased, and liable, under the Customs and Inland Revenue Act, 1881, to duty as part of the estate and effects in respect of which probate of his will was granted to the defendants. The answer of the defendants submitted that the property comprised in the conveyances was real estate of Sir Henry Meux, and so remained at the time of his death, and that it was not liable to duty as alleged. The defendants also insisted that they ought not to have paid duty in respect of the money invested in the first and third purchases of land, and claimed a return of the duty so paid.

The Queen's Bench Division (Mathew and Smith, JJ.), were of opinion that the orders of the Lord Justices and the conveyances to the committees shewed a clear intention, that the accumulations of the lunatic's personalty should continue to be personal estate, and should never form part of his real estate; and

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therefore, the learned judges were of opinion that the accumulations of the personal estate were liable to probate duty, although they had been, and were at the time of the lunatic's death, invested in land. Judgment was given for the Crown. (1)

The defendants appealed.

After the appeal had been set down for hearing, an order was made that Sir Henry Bruce Meux, claiming to be interested as heir-at-law of Sir Henry Meux, deceased, should be at liberty to appeal against the judgment of the Queen's Bench Division, as being a person interested in, but not a party in, the cause.

Dec. 4, 5, 8. *Horace Davey, Q.C.* (*Arthur Leach* with him), for the defendants (the executors of Sir Henry Meux). The land bought and paid for out of the accumulations of the lunatic's personal estate was land for all purposes at the time of his death, and cannot be considered to have been part of his personal estate; its value, therefore, is not liable to probate duty. In order that probate duty may attach, the Crown is bound to shew that the property in respect of which it is claimed is personal property, which vests in the legal personal representatives virtute officii; or, as the proposition may be otherwise expressed, probate duty attaches only on property, which vests as personal property in the legal personal representatives virtute officii. If land vests in executors under special limitations contained in the will by which the testator has selected the same persons, who are his executors, to be also his trustees for the purpose of carrying out certain trusts connected with the land, or if land vests in executors as purchasers under a special limitation contained in some settlement, in neither instance will the land be liable to probate duty. The limitations contained in the habendum of the conveyances to the committees cannot alter the nature of the property. The exact effect of a trust of land for a man, his executors, administrators, and assigns, may perhaps be a matter of doubt. One construction may be that a limitation of an equitable interest in realty to a man, his executors, administrators, and assigns, will convey to him the fee simple. But in 2 Preston on Estates, ch. 5, p. 64, it is said that in a deed words of limitation are just

(1) 14 Q. B. D. 895.

as necessary to create an equitable fee as they are to create a legal fee. Therefore the defendants do not much rely upon this view. Another construction is that the limitation to the lunatic, his executors, administrators, and assigns, confers a life estate upon him with a special remainder to his executors, administrators, and assigns. The difficulty attending this construction is that the lunatic takes only an estate for his life, and that there are no words of limitation in the gift to the executors, administrators, and assigns which after his death will carry the fee simple to them. But for the defendants it is suggested that a trust of that kind creates an equitable fee in the land, not perhaps by force of the words, "executors, administrators, and assigns," which are merely superfluous, and have no conveyancing virtue, but because a trust of land for a man creates at least an estate for his life, and although the addition of the words, "executors, administrators, and assigns," will not enlarge that estate for life, nevertheless inasmuch as the purchase-money came out of the lunatic's funds, there would be a resulting trust of the inheritance in his favour, which would unite with the express equitable estate for his life and create an equitable fee. But at all events a trust for a man, his executors, administrators, and assigns, cannot turn realty into personalty, and into money. The Crown, however, must shew that what is land in fact and land in law, must be deemed to be money in equity. The direction to reinvest in land the proceeds of the sale of any part of the lands conveyed to the committees, conclusively negatives any suggestion that the conveyances contain a constructive conversion of the land into money. As to the declaration that lands are to be considered as part of the lunatic's personal estate, what effect that declaration might have had as regarded the devolution of the property if any question had arisen between those who took his real estate and those who took his personal estate under his will, may be doubtful; but it does not arise now because the testator's son took both the real and the personal estate under the residuary clauses in the will; and the declaration does not so operate as to convert the land into money, and has not such an effect that whoever takes the property under the trust for the lunatic, his executors, administrators, and assigns, will take it as money and not as land. The only

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mode known to Courts of Equity or to the law by which a constructive conversion of land into money or of money into land can be effected, is by means of an imperative direction or trust for conversion. A mere intention to sell land and turn it into money, is insufficient to convert it into personalty. If land is vested in trustees upon trust to sell without any discretion being left in them whether they will sell or not—a discretion as to the time of selling is not material—that is in equity a constructive conversion, and inasmuch as what ought to be done is considered as done, the land must in a Court of Equity be treated as money for all purposes of devolution, and its value is liable to probate duty. But no other mode is known to the law whereby land can be converted into money. A testator or a settlor can, if he pleases, allow his land to devolve as if it were personal estate: he may direct that his next of kin shall take his land: the devise to, or the settlement upon, the next of kin is quite valid, and if appropriate words of limitation are used whenever they are necessary to carry the inheritance, the land will at his death pass to the next of kin in fee simple; but in a case of that kind there is no constructive conversion, for there is no imperative direction to trustees to be exercised during his life to sell the land, and to hold it and deal with it as money. And in the conveyances to the committees there is no imperative trust for sale, leaving them no discretion whether it shall be executed. If the land had been sold under the power of sale during the lunatic's lifetime, the proceeds would have become subject to the trust for reinvestment in real estate. Under these circumstances it is scarcely possible to argue that the lands conveyed to the trustees can be regarded as money; in order to convert them into money in equity, the lands ought to have been vested in trustees with an imperative direction to sell and to hold the proceeds in trust for the lunatic, his executors, administrators, and assigns. It is possible that if upon the lunatic's death a conflict had arisen between those who took his real estate and those who took his personal estate, those taking the personal estate might have had some equity to have the conveyances reformed, and might have been able to enforce that equity by an action in the Chancery Division, so that the lands might devolve

upon them: that, however, is an equity not of the Crown, but of the next of kin; the Crown cannot enforce an equity for the purposes of probate duty, which is either waived or treated as satisfied by the parties entitled to it: by Lord Langdale, M.R., in *Matson* v. *Swift.* (1) Under no circumstances could the Crown have maintained a suit for the purpose of reforming these conveyances. The lunatic's real and personal estate are now vested in Sir Henry Bruce Meux, and the Crown cannot call upon him to enforce the equity against himself for the mere purpose of allowing it to obtain the payment of probate duty, to which under the words of the conveyances it would not be entitled. It is admitted on behalf of the defendants that where an imperative trust for sale exists, it is immaterial for the purposes of probate duty whether the trustees have or have not performed the trust, or whether the property has or has not been conveyed, for the principle is that what is agreed to be done is considered in equity as done, and the land is bound by the absolute trust for conversion: *Attorney General* v. *Brunning* (2); but in the present case it was merely intended that the persons entitled to the lunatic's personal estate should take the lands as personæ designatæ, and that they should take them as real estate. If Sir Henry Bruce Meux had died in his father's lifetime, the lunatic would have died intestate as to his residuary real and personal estate; but whether the heir-at-law or the next of kin would be entitled to the lands, he would take them as lands; the lands would not become personal estate merely because the next of kin is entitled to them. The declaration at its utmost latitude merely amounts to this, that the lands comprised in the conveyances were to be held on the same trusts as the personal estate of the lunatic; the words of it did not vest the lands in his executors; the legal estate in fee simple remained in the committees, and, as already suggested, an equitable fee simple vested in the lunatic under the trust for him, his executors, administrators, and assigns, so that if he had recovered his reason before his death, he could have called upon his committees to convey the legal estate to him. The conveyance is his deed; the purchase is his. But even if the language of the conveyances is sufficient to vest the

(1) 8 Beav. 368, at pp. 376, 377.

(2) 8 H. L. C. 243.

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land in the lunatic's executors, they do not take it virtute officii, that is, by force of the administration granted to them by the Probate Division, but they take it by force of the limitations in the deeds. The more correct view, however, is that upon the death of the lunatic the cestui que trust was, not his executors, but his heir-at-law. The words "executors, administrators, and assigns," when they occur in a deed have no effect; and in the present case they are unintelligible because the trust, as declared, relates to land and not to the proceeds of its sale. The conveyances only declare that certain persons who are to be ascertained by the probate of the lunatic's will, are to take the land; but that is very different from converting the land into money.

As to the authorities bearing upon the construction of the conveyances, *Attorney General* v. *Mangles* (1) shews that a declaration, that land shall be considered as personal estate, will not make it personal estate for the purposes of duty. The principles laid down in the judgment of Lord Langdale, M.R., in *Matson* v. *Swift* (2), shew in what cases probate duty is payable in respect of realty; and the decision was approved of by the House of Lords in *Attorney General* v. *Brunning* (3), although perhaps some of the expressions in the judgment of Lord Langdale, M.R., went too far. The contention for the defendants is not at variance with *Attorney General* v. *Hubbuck* (4); that was a case as to partnership, but the principles laid down in the judgments in the Court of Appeal are adopted in their entirety as the basis of the argument for the defendants in the present case. Before the Queen's Bench Division reliance on behalf of the Crown was placed upon *Tait* v. *Lathbury* (5); but that was a case of an executory trust to settle real estate upon such trusts, as would best correspond with the subsisting trusts of the funds out of which it was bought, and one of those trusts was a power to sell the funds and to vary and transpose the securities; and it is very plain that the power would allow the trustees to sell the real estate so bought by them, just as they might have sold and reinvested the funds. *Tait* v. *Lathbury* (5) is not a decision

(1) 5 M. & W. 120.
(2) 8 Beav. 368.
(3) 8 H. L. C. 243.
(4) 13 Q. B. D. 275.
(5) Law Rep. 1 Eq. 174.

adverse to the argument for the defendants. *Advocate General* v. *Anstruther* (1) was the case of an infant, and not of a lunatic; and the decisions of Scotch Courts can hardly be deemed to be authorities as to the law affecting real estate in England.

Montague Cookson, Q.C. (*Roland Vaughan Williams*, with him), for Sir Henry Bruce Meux, Bart. At the time of the lunatic's death the property in question in this information was land; and even if it would pass to his personal representatives or next of kin, that would not make it liable to either probate duty or legacy duty, as is plain from the reasoning in the judgment of James, L.J., in *Chatfield* v. *Berchtoldt.* (2) The property can be turned into personal estate only by the provisions of the deed, and the very words of the direction that the lands conveyed shall be "considered as part of the personal estate" shew that in truth it is not personal estate. Even if some equity in favour of the lunatic's personal representatives or next of kin was attached after his death to the lands conveyed, that would not make them liable to probate duty: they would not be recovered by the personal representatives or next of kin as part of the lunatic's personal estate. Upon a gift of realty to the executor of a person named the executor must authenticate his title by producing the probate of that person's will; but the probate will not turn the realty into assets to be administered by the executor.

Sir R. E. Webster, A.G., and *Sir J. E. Gorst, S.G.* (*F. Vaughan Hawkins*, with them), for the Crown. The property comprised in the conveyances to the committees did not cease to be personal estate in the eye of the law: for the purposes of probate duty it must not be deemed to have been turned into land, and therefore it is unnecessary to consider whether it has been turned back into money. It was always intended that the property should remain money. In the case of an infant, a Court of Equity never changes the character of his property: *In re Phillips* (3); *Ware* v. *Polhill* (4); in the case of a lunatic it does so only by an express order, and when it is clearly for his benefit

(1) 13 Sc. Sess. Cas. (2nd Series), 450.
(2) Law Rep. 7 Ch. 192.
(3) 19 Ves. 122.
(4) 11 Ves. 278.

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that the change shall be made. The form of the declaration used in these conveyances has been known for a great many years, and does not merely express an intention, but is a determination of the Court that the property shall be considered as personal estate. That is plain from *Ashburton* v. *Ashburton*. (1) In that case it was ordered by Lord Eldon, L.C., though there was no authority in the will for changing the nature of the property, that the personal property of an infant aged eighteen years should be laid out in the purchase of land, and that the land purchased should be conveyed in trust for the infant, his executors, administrators, and assigns until he should attain twenty-one, and afterwards for him and his heirs. In that case the intention was that the property until the infant should become twenty-one, should go as personal property in the event of his death, and that after he should attain the age of twenty-one, in the event of his death without any further will, it should go to his heirs. It is to be recollected that before 1 Vict. c. 26, s. 7, an infant could make a will of any personal property, and in *Ashburton* v. *Ashburton* (1) no doubt the intention of the Court was that the infant should have the same power of disposing of the property by will as he would have had if it had not been invested in land, and that the character of the property should not be changed. In that sense before 1 Vict. c. 26, s. 7, the will of an infant dealing with personalty might affect the title to realty: or perhaps the true view is that before 1 Vict. c. 26, s. 7, an infant could not devise his real estate so as to vest a good title in his devisee; but he could effectually bequeath the right which he possessed to have the land re-converted into money and paid over to his personal estate; the legatee would not have taken the land, but he might have compelled the heir-at-law of the infant, being the person entitled to the legal estate in the land, to convert it into money, and to pay over the proceeds to the executor of the infant's will for the legatee's benefit. In a case of that kind probate duty would now be payable if the infant were to die under twenty-one, for the property would retain its character of personalty. In *Webb* v. *Lord Shaftsbury* (2) a clear opinion was expressed by Leach, V.C., that a declaration that

(1) 6 Ves. 5. (2) 6 Madd. 100.

land to be purchased out of accumulations should be of the nature of personal estate, would constitute it an investment of them upon real security. The declaration, being an act of the Court, was sufficient to cause the property to retain the character of personalty. Lord Cottenham, L.C., in *Re Badcock* (1), expressed an opinion that if the money of a lunatic were laid out in the purchase of land, it would retain its character of personalty. In *Attorney General* v. *Hubbuck* (2) land was held to be liable to probate duty, although there was no express trust for sale, which, if the argument for the defendants were correct, would be necessary to enable the Crown to succeed. If by virtue of the declaration the money invested in the lands retained its character, although the real object of the declaration was to determine the devolution of the property, that is sufficient to entitle the Crown to probate duty. The form of order and form of declaration used in the present case have been long adopted. It was competent for the Lords Justices sitting in Lunacy by their order to make land bought out of the accumulations to be considered by all Courts and for all purposes as personalty, at least until the lunatic should again become of sound mind; if he never recovered his senses, the beneficial interest in the land would go to those who are entitled to his personal property. In *Attorney General* v. *Lomas* (3) it was laid down that when a will contains an absolute trust for the conversion of land, and, by reason of the failure of the limitation of the proceeds contained in the will, the testator's heir takes the undisposed of interest, he takes it as money, and on his death probate duty is payable upon it, although the land still remains unsold. This case shews that for the purposes of probate duty the nature of the directions as to the property is regarded, and not the character of the person who takes it. The proposition of the Crown may be stated in these terms: that although by an order of the Court a certain part of the lunatic's personal estate was invested physically in real estate, yet those becoming entitled to his personal estate on his death, whenever that event might happen, were entitled to have the money so invested or the value of the land purchased with the money so

(1) 4 My. & Cr. 440. (2) 13 Q. B. D. 275.

(3) Law Rep. 9 Ex. 29.

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invested paid to them. The right to the money or the value of the land was of a personal nature, and vested in the executors virtute officii. It is not contended that the Crown is entitled to probate duty in respect of this land, but the Crown is entitled to it in respect of the beneficial right which the lunatic had in his lifetime to compel its conversion into money: it is unnecessary to say whether his executors could have enforced a sale. The lunatic, if he had regained his senses, might have elected to take the land as land, and might have released his personal right; his election to accept the property in the condition of realty might have been manifested by his dealing with it as realty, as, for instance, by receiving the rents during a long period of years; but if there was on his part no election, no indication of an intention to take the land as land, after he had recovered his reason, it would pass under the bequest of personalty in the residuary clause of his will. And as he continued a lunatic to the time of his death, his beneficial right passed to his executors. To whomsoever the land might descend, it was bound by the trust declared in the habendum for the lunatic, "his executors, administrators, and assigns." The executors might have had the land realised and the proceeds of the sale paid to them: it is probably correct to say that after the lunatic's death there was no owner of the equitable estate in the inheritance. The declaration that the property was to be considered personalty, carried with it an implied trust for sale: in *Attorney General* v. *Hubbuck* (1) there was no express trust for sale, but the Court of Appeal held that real estate, being part of the assets of a partnership, was liable to probate duty, because several persons had a right to realise it and reduce it into personal estate: in the present case, by order of the Lords Justices, real property was to be treated as personal property: the two cases are analogous. In the present case there always was a personal right, which remained personal property during the lifetime of the lunatic, and upon which the duty attached at his death. The main argument for the Crown is that this property was always personalty; it could be turned into realty only by the order of the Lords Justices; but, as the declaration shews, they intended that it should remain personalty

(1) 13 Q. B. D. 275.

for all intents and purposes. The conveyances were drawn up under the supervision of the Lords Justices, the investments were made pursuant to their provisions, and the language is appropriate to personal property only. The order of the Lords Justices would not be exhausted so soon as Sir Henry Meux became sane: it was stereotyped in the conveyances.

[COTTON, L.J. Could the Lords Justices, sitting in Lunacy, have ordered a sale of these lands independently of the powers given under the Lunacy Regulation Act, 1853?]

They could have authorized a sale for any purpose: they could have made a fresh order, and could have ordered a sale of the land and an investment of the proceeds in any manner in which personalty can be invested. The powers of leasing were merely inserted for the purpose of enabling the trustees to deal beneficially with the property, while it remained physically in the condition of realty: the property, whilst it is in the condition of land, must, no doubt, be dealt with as real estate, but the interest of the lunatic was really in the proceeds of the realization of the property when it should have been turned into money. The order of the Lords Justices and the conveyances executed in pursuance of it, reserved to the lunatic beneficial rights, which at his death descended to his executors, and therefore the Crown is entitled to probate duty.

Montague Cookson, Q.C., in reply. It is plain that probate duty is granted in respect of only personal property. No doubt, upon turning to part 3 of the schedule of the Probate Duty Act (55 Geo. 3, c. 184), it is enacted merely that the duty is payable for "the estate and effects for or in respect of which such probate . . . shall be granted"; but by s. 37 of that Act the penalty is imposed for administering any part of the "personal estate and effects," without having obtained a grant of probate or letters of administration. And this language makes it clear that the obligation to obtain the grant exists only as to what is personalty in the strictest sense of the word. The argument for the Crown is that this property was originally money, and has never been altered from money into land; but the property is physically land, and must be so dealt with for all purposes. The Lords Justices, sitting in Lunacy, directed that land should be bought;

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the money was not invested on mortgage, in which event it would have retained its character of personalty. The difference between an investment by way of mortgage and an investment by way of purchase is beyond all question. The Lords Justices had no power to convert again into money land, which was already land by virtue of the purchase: their powers to convert land were defined by the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), s. 116. They could not do what was inconsistent with and repugnant to their own orders and declarations. This was an investment of money in the purchase of land, and it must be shewn that it could be re-converted. The Lords Justices were functi officio when the lunacy came to an end. Moreover, upon the death of the lunatic no one could have called for a conversion. If the land had reached the executors as land, they might have been called upon to distribute it as personal estate; but that would not have made it liable to probate duty, because it would not be recovered by the executors virtute officii. *Ashburton* v. *Ashburton* (1) and *Webb* v. *Lord Shaftsbury* (2), if they are correctly reported, seem to be erroneous decisions. The money has been irrevocably vested in land, and cannot be got back. The object of the Lords Justices, sitting in Lunacy, was to avoid the necessity of the payment of probate duty, but they desired not to displace the equities existing between the real and personal representatives. The real meaning of the trust for the lunatic, his executors, administrators, and assigns, coupled with the declation, must now be determined for the first time.

LORD ESHER, M.R. The question in this case is whether in respect of certain property the Crown was entitled, on the death of Sir Henry Meux, to probate duty. It is clear beyond controversy, that at the moment of Sir Henry Meux's death the property was in fact land and not money. But it is argued for the Crown, that although it was in fact land, yet it is to be treated as if at that moment it was personal property, that is, money; and the Crown alleges that the property must be so treated for several reasons. It is asserted on the other side that none of those reasons can prevail, and that as this property was

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in fact land at the moment of the death, it must be treated as land, and therefore is not subject to probate duty.

The whole question depends upon the state of matters at the moment of the death. That is the moment to be considered. I should myself say, that under ordinary circumstances that which is land in fact at the moment of the death, cannot be treated as personal estate, or as being anything but land, unless a Court of equity will treat it as personal property, that is, money. If it is land, and is in the hands of trustees, or persons who are not trustees, as land at the moment of the death, then at common law it must be treated as land. That seems to me to be obvious. The question must therefore be whether, although it is land and in the hands of persons, who if it were necessary to transfer the ownership of it, would have to convey it as land, or to deal with it as land, a Court of Equity would treat it as personal estate, and not as land. If a Court of Equity would so treat it, then I agree that under the circumstances of this case it must be, for the purpose of probate duty, treated as personal estate. But I think that a Court of Equity will not deem that which is in fact land, and which must be treated and conveyed as land, to be personal estate or money, unless, during the lifetime of the person whose land is being dealt with, or from whom the devolution is being considered, a contract, or a trust, or an order of the Court, was imposed upon the land by which it was to be sold and converted into money, and which sale could according to such contract, or trust, or order, be carried out during the lifetime of the person the devolution of whose property is being considered. If that be true, then we have to consider here, subject to another question which I will afterwards deal with, whether as regards this property which was land, and land in the hands of the trustees at the time of the death of Sir Henry Meux, there was a contract, or a trust, or an order, which directed that the land should be sold, and that that sale might take place during the lifetime of Sir Henry Meux. That there was any contract to that effect, is not pretended. It is said that there were an order and a trust, that that order was imposed by the Lords Justices in Lunacy, and that under their direction a deed was executed which contained a trust to that effect. It is said that the Lords

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Justices in Lunacy—for the argument was carried thus far—had no authority to alter the condition of the property of a lunatic during his lunacy. To my mind that is wholly untenable. The Lords Justices in Lunacy have authority, and power, and jurisdiction, to act as if they were guardians of the lunatic, and to do what is considered most for his benefit, and they were acting in this case entirely with the view to what was best for his benefit. It is true that as a general rule, and as far as they can, they endeavour so to deal with his property, that if he were to become sane, he would find himself with all the powers and facilities that he would have had, if he had never become a lunatic. That is true as a general rule, but to say that they can only deal with his property to that extent, seems to me to be in fact untrue; because it is beyond question that they can make such an order as they did here, that money should be invested in land or that land should be converted into money; and if that order is to continue to exist when the lunatic becomes again sane, it is contrary to truth and fact to say that they had left him with the same facilities, and in the same position as if they had not made such an order. If, after the order had been carried out, and the money had been invested in the purchase of land under this deed, Sir Henry Meux had come to his senses, it is impossible —it is indeed a contradiction to truth—to say that he would have been in the same position as if the property had still been money. He would not have been, and could not have been in the same position. The property had become land. It is true that if he had become sane, he would have had absolute power to deal with the land; it would have been in the hands of the trustees but for his benefit, he would have been a cestui que trust and would have had all the powers of a cestui que trust, but that would have been by virtue of his beneficial interest in the property. It is said that he must elect in order to take the property as land. What election was necessary? He would have had the land with all the powers of a sane cestui que trust, for whose benefit the land is held by trustees. He could have insisted upon all those rights, and he might have kept the land without any election, as it seems to me, and dealt with it as land, and if he sold it, he would have sold it pursuant to his right

to insist that his trustees should convey it according to his contract of sale: he might have sold it and might have received the money representing the price; but that would be wholly irrespective of any order of the Court to that effect. That would have been the result of his becoming sane, after the Court had exercised its powers whilst he was insane, by doing that which he, if he had been sane, could have done for himself, namely, by investing his money in the purchase of land. So far, therefore, as anything which was to be done in his lifetime goes, it seems to me that any declaration to the effect of the declaration which is contained in the order, could have no effect; it did not give him any power, if he became sane, to do anything which otherwise he would not have had power to do, and it did not prevent him from doing anything, if he became sane, which being sane he would have had the power to do. It had no effect upon the supposition that he was to become sane. It seems to me, therefore, that such a declaration would not have given the Lords Justices in Lunacy any power to deal with the land, after they had once invested the money in the purchase of land, otherwise than they would have had power to do if no such declaration had been made. It being land after they had directed the money to be invested and the land of a lunatic, what power would they have had? They would have had certain powers to order the land to be sold, which powers are contained in the deed, but they would only have had power to order that land to be sold, just as they would have had power over any other land of the lunatic; but those powers are limited powers regulated by an Act of Parliament. They would have had only those powers, and they would not have had by virtue of this declaration any greater powers.

Then it was suggested by the counsel for the defendants that this declaration had no effect at all. With that I certainly cannot agree. It is a recognised form; it has been in long use, and it has some effect, it has some use. What is the use? On the one side it is said that it has the effect of making that which is land personalty, and forcing upon all Courts and all persons the obligation of treating this as if it were personalty. On the other side, it is said that it has no effect. I venture to say that

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both contentions are wrong. What effect has it? The formula consists of two parts. The one is the trust, which is declared making this property go in trust for Sir Henry Meux, his executors, administrators, and assigns; that is one part of it; and the other is the declaration "that the manors, advowsons, hereditaments, and premises hereinbefore expressed to be hereby granted are to all intents and purposes to be considered as part of the personal estate of the said Sir Henry Meux." Now, with regard to the first part, it seems to me it has an effect in directing how this land shall descend. We cannot treat those words as struck out, and say that this land will descend according to the ordinary rules of real property. It is to descend according to those words. What effect have these words? They make this land descend to the persons, to whom the personal estate would go. That is the effect that they have. But how is it to descend? What will it be in the hands of those persons? It will not in truth be money; they will be precisely in the same position with regard to that land when they get it, if nothing else is done before they get it, as Sir Henry Meux would have been in if Sir Henry Meux had become sane. They would take it as land, and they would have power to deal with it absolutely as land. They must deal with it as land, if they deal with it at all; they must keep it, and receive the rents, or live upon it; or they must sell it and receive the money, the proceeds of the sale. In either way they must treat it as land. Therefore it would seem to me, that under that part of the stipulation it would go to them, as the persons designated by the deed and by the order of the Court to whom it is to go. I think that the Court had power to make that order, a power which they have always exercised, and the conveyance carries out that order.

Now that order seems to me to be assisted by the declaration. The declaration shews that that is the meaning of the words in the clause of conveyance. But then something else is relied upon naturally by the Crown, and that is that in the deed the declaration is that "these manors to be hereby granted are to all intents and purposes to be considered as part of the personal estate." Now that has been used in two ways. By the one side it is said that that goes beyond the order of the Court, and so it

certainly does, for those words "to all intents and purposes" are not in the order of the Court. But it is said by the Crown that although that may be true, nevertheless the conveyance was made under the supervision of the Court by an officer of the Court, and, therefore, that the Court has assented to the conveyance with those words in it. It is true the Court has so done. The Court, so far as that order was concerned, being functus officii, in my opinion could not have altered that order after they had once made it in the presence of the parties. If the officer of the Court, or the Court itself, overlooking what had been ordered by the Court, put something in which was not in the order, I do not think the words in the conveyance can go beyond the order so as to be effective. But I will go further and say that, in my judgment, the Lord Justices in Lunacy would have no authority to deal with the matter, and to insert those words if they are to have greater effect than that which the Lords Justices in Lunacy had power to do within their jurisdiction, namely, to deal with the property of the lunatic for his benefit. I do not think they would have power to put in those words, so as to have an effect which would be wholly irrespective of any possible benefit to the lunatic. Therefore, although I agree in deciding in favour of this appeal, I think that we must disregard the words "to all intents and purposes," and, for one reason or the other of the two which I have just enunciated, we must treat those words as non-existing and pass them by.

Then if those words are taken out, it seems to me that the declaration has the same effect as the words in the clause of conveyance, and that it only directs how this property on the death of Sir Henry Meux is to go, and it leaves it to go to those persons who, although they may not be the heir or devisees of the real estate, are to take it as land. Therefore although it is the rule in the Court of Equity to consider that as done which is ordered or contracted to be done, yet there being nothing to shew that at the death this would not be treated by a Court of Equity as land, and there being no power in the Court of Equity to treat this at the moment of the death as otherwise than land, and although by reason of the order after the death of Sir Henry Meux it passes to particular persons under words which would

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not convey land, yet as the order takes effect after the death and has no effect during the life, it follows, as it seems to me, that according to the judgment of Lord Cranworth in *Attorney General* v. *Brunning* (1), shewing that nothing which is to take effect after the death, and which has no effect during the life, can be treated as entitling the Crown to probate duty, in this case at least the Crown has not shewn itself entitled to probate duty.

Then it was suggested, although perhaps that is the same point as I have stated before, that the Court has declared that this property shall be treated as personal estate. To my mind, unless the Court does something more than merely declare that it shall be so treated, that declaration has no effect. If this deed had not contained certain words of conveyance, or if the order of Court had not dealt with a certain mode of conveyance, so as to make this property pass to different persons from those who would take land under the ordinary law, if all that the Court put into the order, and all that it had stated in the deed was a declaration that the land which had been directed to be purchased with the money of the lunatic was to be considered as personal estate, such a declaration would have no effect.

Therefore upon the whole I am of opinion that this property was land at the death of Sir Henry Meux; that no order or contract has been proved under which it would have been regarded by a Court of Equity at the moment of his death as anything but land, and that this property at the moment of the death being land, the Crown is not entitled to probate duty in respect of it. This appeal, therefore, must be allowed.

COTTON, L.J. The question in this case is certainly important. It is whether certain property of Sir Henry Meux was property for or in respect of which probate was granted to the executors.

To determine that question, I must look at what was his right, and what was the property in him at the time of his death. At the time of his death undoubtedly the property in question in this appeal was real property, of which he had not the legal estate. There were, however, certain trusts, the effect of which is matter in dispute now. But if the effect of the limitation to

(1) 8 H. L. C. 243, at p. 260.

him, his executors, administrators, and assigns, did not pass the absolute interest beneficially to him, there was a resulting trust for him upon the ordinary principles of equity. That gave him a freehold estate in respect of which no probate would be necessary or granted.

Now it is said and argued, and it is undoubtedly true, that in many instances, where, at the time of the death, the property has been physically land, yet it has been held that probate duty must be paid in respect thereof: and I think that it will be desirable to consider the circumstances in which it has been so held, it being conceded that this in its details and circumstances is a new case.

Let me look at the cases which have been referred to in the argument. First, there are cases where a contract for sale has been made by a testator during his lifetime. What is his right in these cases? His right at the time of his death is, if the contract is one capable of being enforced and of being carried into effect, to receive under that contract money, and money only. If he dies before the contract is completed, his heir will be bound to hand over the land to the purchaser: he has a right at the time of his death to receive the money, and that right passes to his executor, and passes as money, and as part of the personal estate and effects of the deceased. The case of *Attorney-General* v. *Brunning* (1) is an instance of that.

Then the rule of equity goes further than that. If a partner dies, part of the partnership assets being real estate, it is held that on the value which his representatives get from that real estate probate duty must be paid, and that is exemplified by the case of *Attorney-General* v. *Hubbuck*. (2) But why is it said that they must pay probate duty on the value of the real estate coming to them? On this ground, that unless some contract or agreement binds the partners during the lifetime of the deceased to the contrary, the result of every partnership is that when the partnership comes to an end, either by effluxion of time or by death, the land and all the other assets of the partnership shall be sold, and after paying all the liabilities, then the balance, whether arising from real estate or from personal estate, is to be

(1) 8 H. L. C. 243. (2) 13 Q. B. D. 275.

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divided between the parties in proportion to their interest in the partnership; and therefore the land is not looked upon as belonging to the individual partners, or as belonging to them in the proportion of their interest in the partnership, but the partners are looked upon as simply having a right to a proportionate share of what may be the result of the winding-up, when all the property is sold, all the debts paid, and the surplus divided between the partners.

Another instance is when there is a trust for sale, that is to say, where property is conveyed to trustees to sell, and the deceased was at his death entitled to the proceeds or to a share of them. In such a case probate duty must be paid. But the sale must not depend on any option of the deceased, and must be capable of being carried into effect during his lifetime, because the time of death is the moment to be looked to for the purpose of ascertaining whether the property is liable to probate duty or not. So strictly has this restriction upon the operation of the rule been followed, that in the case which has been referred to before Lord Langdale, of *Matson* v. *Swift* (1), although there was a conveyance to trustees upon trust to sell—a sale which might be executed during the lifetime of the settlor—yet as no one was a party to the deed except the trustees and the settlor, the Court held in effect that the sale was entirely within his option, and at the time of the death he had a power of saying there should be no sale, that is, that he was a mere cestui que trust of land, and that as this was so, the property could not as against his will be deemed, at the time of his death, to have been converted into money. The Court put that interpretation upon the deed.

But in all those cases we see that the consequence of the rights existing at the time of the owner's death, which he could not modify, was a sale and turning into money of the property, which, in fact, was in the shape of land. And the Court of Equity looking upon that which is directed to be done, and which the owner himself, at the time of his death, could not interfere with, as being done, held his interest to be an interest in money and not an interest in land; and, therefore, probate duty upon the value of that, which though in fact land, was held in equity to

(1) 8 Beav. 368.

be personalty, had to be paid. The result in my opinion is that to make what is in fact land liable to probate duty, there must be a trust or contract which would require the sale of the land. Equity gives the same effect to a trust or contract which requires a sale, as if there had in fact been a sale, and therefore treats land subject to such a trust or contract as money.

Can we see anything like that in this case, which, it is admitted, is new? In my opinion, we ought to find some provision either in the order of the Court or in the limitations of the deed, directing that this property is at or before the time of the testator's death to be converted into money, so that his interest in it must be considered as money. First as to the order of the Lord Justices. The order does undoubtedly declare that this land is to be considered as part of the personal estate of Sir Henry Meux. It is said that that of itself would be effectual to make this his personal estate at the time of his death, so as to make it part of the estate and effects in respect of which probate is granted. We were referred to the orders made in the case of infants, where during their infancy money belonging to them has been invested in land. They do not govern or decide this case, because in Lunacy it is not the fact that the Lords Justices sitting in Lunacy have no power to alter property from personal estate to real estate. The personal estate of the lunatic is in the hands of the Court, and it deals with that in the way which it thinks best for the interest of the lunatic, and it is competent for the Court to apply the money of the lunatic which it has in hand in a way which necessarily changes the nature of the property; for instance, if a large fund is in hand, and if it turns out that it is advisable that buildings should be put on the land, those buildings which are put up for the benefit of the lunatic as the owner of the land, cannot be said to continue personalty; at least, I have never known a case of that kind. Sometimes a part of the money, that is to say, that part of the expenditure which produces no immediate benefit to the lunatic, is made a charge on the land, and of course the personal representative of the lunatic at his death is entitled to that charge, which is unquestionably part of the personal estate of the lunatic; and then he deals with it in such a way as he has to deal with the other personal estate of

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the lunatic. But in my opinion the mere direction that the personal estate of the lunatic, when invested in land, shall continue part of the personal estate, has not the effect of making it personal estate, so that probate duty is to be considered as liable to be paid for or in respect of that land, which, in fact, has been bought. If the order had directed limitations to be introduced into the deeds, which would have the effect of directing the land to be converted into money, then of course the result contended for by the Attorney-General here would be the consequence, and one must look to see what are the limitations in these deeds.

In my opinion the intention in buying this land was to make up from time to time a property, which would be fit for the heir-at-law if he succeeded to this property, or for the devisee, the son of the lunatic. One looks to see what is in the schedule; and if I looked at the petitions on which the orders were made, it would be clearer still. There are from time to time purchases of land in Wiltshire, where estate is added to estate, and there is a purchase of land about the house which belonged to the lunatic at the time of the lunacy, that is, there is making one estate in Wiltshire, and adding to the estate which the lunatic had had in Hertfordshire. If I look to that, it is clear the Court desired, as it always does, not to interfere unnecessarily with the interest of those who succeed to the personal estate, or with the interest of those who succeed to the real estate. Not to give to those who succeed to the real estate that, which if the Court had not acted as it did, would have gone to those who were entitled to the personal estate, is the general object. In my opinion, the object and effect, both of the order and of the deeds here, is to direct that in the event of there being a separation between the parties entitled to the personal estate, and the parties entitled to the real estate of the lunatic, then this property shall not go as an addition to that which goes to the heir or whoever takes the real estate under the will, but shall be treated as divisible between the parties entitled to the personal estate, so as to preserve the rights of the parties beneficially interested untouched, that is, as they would have been, if this investment had not been made. That would not have the effect of converting this into personalty in the eye of a Court of Equity.

I do not enter into the question, what the effect of the limitations of the deed would be. I feel considerable difficulty about them. But is there anything which, either by the direction of the Court or by what was to be done under the deed, made this a conversion into money, or in any other way made it personal estate? In my opinion one need not consider what might be a possible result, if this land came to be divided between numerous persons, the next of kin, because no sale is directed if it comes to them by this deed. If they were to sell under the authority of a Court, the sale would be in consequence of a decree made in a partition suit. Probably a number of persons would be found to take this land between them as next of kin, and the necessary consequence would be that there would be a partition suit, and that there would be in that suit a sale; but it would not be a sale under any direction contained in this deed.

It is not suggested that there is in terms any trust for sale. Is there an implied trust for sale? It is said that the declaration, that it is to be treated as personal estate for all purposes, has that effect. In my opinion that construction would entirely defeat what is the clear object and intention of the deed; the land is conveyed to these trustees with no trust for sale in terms, and there is in the deed, as directed by the order of the Court, a power of sale with a direction that the proceeds of the sale shall be reinvested in land. If there had been any sale under that power, the money would still have retained in equity its position of being real estate, because the trust to reinvest in land would have made that which was, in fact, money, real estate in the eye of a Court of Equity. To insert here an implied trust for sale would be entirely contrary to principle, because where there is a direction that in certain events there shall be a sale, no other trust for sale can be implied. It is true it is only a power; but still, if there is a power of sale, and a power coupled with a direction that the proceeds are to be kept as land and reinvested in land, it is entirely contrary to the object and intention of that power and direction to say that there shall be an implied trust for sale, which would entirely alter that direction, and render it incapable of being acted upon, and would make what was treated in its form and by the direction of the Court as a settlement of land,

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not a settlement of land, but of that which the Court would consider as personal estate, as money. In my opinion, therefore, it would be quite wrong to imply here any trust for sale.

Then, is there anything else which would imply any direction to turn this into money? There is nothing but the declaration, that it shall be treated for all intents and purposes as part of the personal estate. The meaning and effect which I give to those words, having regard to the rest of this deed, is that if it becomes necessary, in consequence of the different devolution of real and personal estate, to decide to whom this property is to go, it is to go to those who are entitled to the personal estate, and not to those who are entitled to the real estate. It is said that this declaration will make the property liable to probate duty. In my opinion, that declaration was not a matter which could take effect during the lifetime of the lunatic. The declaration could take effect only after his death, and in my opinion it could not change that which was in fact land at the time of his death into money, so as to make it personal estate, for or in respect of which probate would have to be granted to his executors. I think, that nothing here can be considered as in equity converting this land into money, either by directing it to be sold, or by treating it as land for which there is a trust for sale to arise during the lifetime of Sir Henry Meux, the lunatic.

I need deal with only one other point. In my opinion the object and intention was to direct how this property should go after the death of the lunatic. But it is said that that would make those who were entitled to it take it as part of the personal estate, and that therefore the Crown would be entitled to probate duty. Putting aside what in my opinion is conclusive against that contention—that the liability to probate duty must depend upon circumstances existing at the time of the death—I think that that which is given to the persons beneficially, even although they may take it by way of distribution through the hands of the executors, does not necessarily make it liable to probate duty. The question is, is that which they take property which was the personal estate and effects of the testator at the time of his death? Any one may give property to the executors of A. B. to be divided as part of his personal estate, and that would

mean that they are to pay the money among those who are beneficially entitled; but although with regard to the testator who left money in that way, his executors would have to pay probate duty as on his estate, yet the executors of the other testator who would have to receive it and distribute it would not be bound to pay legacy duty. It would not be the personal estate and effects of their testator in respect of which they took out probate, but they would be persons designated to receive as legatees the estate of another testator, and therefore they would not be bound to pay legacy duty as on the property of their testator.

In my opinion this appeal must succeed, and probate duty cannot be claimed in respect of this property.

Before I conclude I may say that in my opinion the Court below has rather gone on a wrong principle, because they say in their judgment this:—"The principle upon which, as it seems to us, the existence of an express or an implied trust for sale has been held sufficient to render moneys invested in land personalty, is that such trusts indicate sufficiently the intention of the person so investing, that his personalty, though invested in land, should remain personalty, and so liable to probate duty." (1) In my opinion that is not the principle. Here there is a direction that the property shall remain personal estate undoubtedly. But is that sufficient? Land is held to be personalty in equity, and liable to probate duty, where there is a trust for sale or a contract for sale, in either case the sale being capable of being duly made during the lifetime of the testator. In these cases a Court of Equity considers that the testator at the time of his death has a right to money and not to land, and that consequently the property is part of his personal estate and effects, in respect of which probate duty is payable to the Crown. That principle does not apply here.

BOWEN, L.J. I am of the same opinion.

We have in the present case to consider, whether the large sum of money which was formed out of the accumulations of the personal estate of the deceased, Sir Henry Meux, after he became a lunatic, and which was invested in the purchase of land, is or is

(1) 14 Q. B. D. 903.

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not subject to probate duty. That depends, it seems to me, upon the question whether the land is part of the estate and effects for and in respect of which probate duty was payable. In order that probate duty may attach, it seems to me that it is correct to say that the Crown must shew that the property is property, which vests as personal estate in the executors virtute officii. Was then this land at the date of the death of Sir Henry Meux actually or constructively money? because the time of his death is the time on which our attention should be fixed.

In order to answer the inquiry whether it was actually or constructively money at the date of his death, we ought first, in order to clear our minds, to consider when is it that land really is to be deemed to be money in the eyes of the law. The answer is short and simple, to my mind: it is only when the right of the person interested in the land is to have it in the shape of money. In some cases something has already passed which has changed what was a right to land into what is to be thenceforward a right to money; and in such an event it is obvious that the right has become a right to money, and, so far as the land is still regarded with reference to the person to whom the right belongs, it is properly regarded, so far as he is concerned, as money. But, if something has not passed which has actually converted it into a right to money, something may be bound to pass which will convert it into money. That comes really to the same thing, because, on the doctrine that equity would consider that which has been agreed to be done, or what is directed to be done, as done, the person interested really has become entitled to money instead of land.

I will take first of all, as an illustration, the instance which was suggested by Kindersley, V.-C., in his judgment in *Darby* v. *Darby* (1) of a testator seised of real estate, who devises it for sale with a direction that the proceeds of the sale shall be distributed among certain persons; each of the persons interested in such a case has a right to have the estate sold and to take the share of the proceeds in money. In such a case as that, so far as regards them, the real estate is in equity converted into personalty, because it is destined to be money, and they have a right to the money which will arise out of the proceeds.

(1) 3 Drew. 495, at p. 505.

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Next I will take the case of a vendor, who has contracted to sell land provided he can make a good title to it, with a right to have the contract enforced and the purchase-money paid at once and during his lifetime. While he lives, in equity his right, if he can make a good title, is to have the money paid to him; and when he dies, the right of his executors is exactly the same. There is the land, which really in the eye of equity is to be treated as money: that is the case of *Attorney General* v. *Brunning*. (1)

Then, lastly, I may take the case of a partnership. It is a fundamental principle that it is implied in every contract of partnership, that quite independently of any express stipulations contained in the contract of partnership, at the dissolution of the partnership all the property of the partnership, whether it is personal or real, whether it is stock-in-trade, or leasehold or freehold, is to be sold, and the net proceeds after satisfying the partnership debts and all the partnership liabilities, are to be divided amongst the partners. This right of sale is a right upon which any partner may insist, and upon which the executors of a partner may insist if the terms of the partnership are such as to give to the executors the right. Of course, in such a case, owing to the implied trust for sale which is involved in the notion of a contract for partnership, there is a certainty that the land, which is held by or for the partnership, will be turned into money, and that the money is the subject-matter of future distribution.

When we pass to the consideration of probate duty, we have to introduce the further limitation that the time at which we are to look is the date of the death, and we have to see whether the land which is actually land, is at the time of the death constructively money, that is to say, whether the right of the person interested in it is at the date when the spirit leaves the body of the dead person, a right to money and not a mere right to land. So, of course, collecting the various instances together, we may say, that really in order to make out for the purposes of probate duty that land is money, there must be found either a contract, or a trust or a direction—an effectual direction, which will have to be followed —by virtue of which something may be done during the lifetime

(1) 8 H. L. C. 243.

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of the owner which will have the effect of changing the land into money.

Now, have we anything in this case which is analogous to the cases which I have mentioned? The Court below appears to have thought that an intention was expressed by the Lords Justices originally, and, so to speak, stereotyped in the deeds and conveyances and in the declaration therein contained, that the personalty of Sir Henry Meux, although invested in land, should remain personalty. What the judges of the Queen's Bench Division said, was this: "The principle upon which, as it seems to us, the existence of an express or an implied trust for sale has been held sufficient to render moneys invested in land personalty, is that such trusts indicate sufficiently the intention of the person so investing, that his personalty, though invested in land, should remain personalty, and so liable to probate duty. We think that these are not the only ways by which such an intention can be indicated." (1) This statement appears to me to be really turning upside down the true way of looking at the question. A mere pious wish, or a pious intention, expressed anywhere, can have no effect. The truth is, as I have said, that land is deemed to be money only when there is something effectual which not merely expresses an intention that it should be money, but confers a right to treat it as money, and to have it treated as money. Turning to this declaration of the Lords Justices which preceded the conveyances, and to the conveyances themselves which embody it, it seems to me that the object of the declaration and the meaning of the declaration are the same; that the real object of the Court was that in the event of Sir Henry Meux dying without recovering his sanity, and in the event of his real estate going one way and his personal estate another, this property should follow the route taken by the personal estate. The language of the conveyance, no doubt, is wide. The property, it is stated, is to be considered to all intents and purposes as personalty. But we must look at the subject-matter with which the Lords Justices were dealing, in order to see exactly (to use the term employed in argument) what it was their duty to do, and what was the practice which they were to follow. Our attention has been directed by the Attorney General and the

(1) 14 Q. B. D. 903.

Solicitor General during the course of the argument, to the kind of declaration, which is found at the beginning of the century, with reference to the purchase of land or investment of money in property for the benefit of an infant. The first case, I think, to which our attention was called, was *Ashburton* v. *Ashburton* (1), then came *Ware* v. *Polhill* (2), then *Webb* v. *Lord Shaftsbury* (3); and finally, what is extremely valuable in this case, the language of the Court in the case of *Ex parte Phillips.* (4) It is extremely valuable, because there the Court points out precisely in what respect the duties and functions of the Court as regards an infant differ from the duties and functions of the Court as regards a lunatic. It appears to have been a settled practice of the Court with regard to infants to abstain in any directions which it gave as to dealing with the infant's property from changing the character of the property in a way which might prejudice the infant, so long as he was an infant, or prejudice or alter the succession of the property, if the infant died before he came of full age. But the Lord Chancellor says (5): "A lunatic stands on quite a different footing; as during the instant of a lucid interval he has precisely the same power of disposition over one species of property as over the other, though in different modes and forms, I admit. The Lord Chancellor, acting under a special commission from the Crown, does what is for his benefit, taking the advice and assistance of the presumptive next of kin and heir as to the management of the property, that may or may not be their own." When orders are made by the Lords Justices in Lunacy for the management of a lunatic's estate, the dominant consideration which is kept in mind by the Court, is to do what really is for the benefit of the lunatic, and everything else gives way to that. Although it may be a convenient and a just mode of looking at the management of the lunatic's property, to endeavour to preserve in ordinary cases, so far as it can be preserved, the property in the condition in which the Lords Justices find it, and not to vary or change the nature of the property so as to alter the succession thereby, nevertheless the dominant matter to

(1) 6 Ves. 5.
(2) 11 Ves. 257.
(3) 6 Madd. 100.
(4) 19 Ves. 118.
(5) 19 Ves. 123.

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be considered, and that to which everything else must yield, is the real benefit of the lunatic himself. I do not go quite so far as my learned Brothers in thinking that a declaration of the Court, if the true effect of it was and the true construction of it was to render necessary or to impose upon the parties who receive the Court's direction the duty of taking the conveyance in such a shape as would render the property liable to probate duty, might not be enforced, even if the conveyances had not followed the prescribed form. I cannot help thinking that there must be good reason for supposing that the Court could call the parties before it to reform the deed with a view to give effect to the real intention of the Court, just as the parties themselves would inter se have the right of appealing to the Court to do so. That right, which would exist in the representatives of the personal estate in a given case, would be a right which would entitle the Crown to come down upon the personal property for probate duty, although the deeds themselves disguised the real nature of the transaction and gave imperfect effect to the original direction of the Court. But it really is not necessary to decide that. I only wish to protect myself against it being supposed that I for my part have made up my mind that that is not so; because I think that the true intention of this declaration is properly embodied in the conveyances, and that all that was intended to be done, and all that has been done, was to insure that in the case of Sir Henry Meux's death this property should follow the route taken by the personal property: if so, there is no necessity for the implication, or the idea, of any further conversion, or any further sale of this land. During Sir Henry Meux's lifetime, if he had recovered his sanity, or even if he had had a lucid interval of which Lord Eldon speaks, he could have compelled his trustees to act for him, and he would, I think, have had a right to take the land. He had an equitable right to take the land during his life. Therefore, so far as his lifetime is concerned, there would be no obligation for a sale and no necessity for the hypothesis of a sale. After his death, it seems to me that there is no sort of necessity for the idea of sale any more than there was in his lifetime. It seems to me that this land was intended to remain as land, and was intended to reach those interested in the personal estate as land.

Of course, as soon as it reached them, they could do what they liked with it, just as they could with anything else that vested in them under the will. So far as what happens after the death is concerned, we are bound to remember that it is not what happens after the death that is material, but it is to the moment of death to which we must look to ascertain whether the right of the persons interested at that moment is a right to land, or a mere right to money. The land, therefore, in this case, according to my view, would not vest in the executors virtute officii, but they would take, if at all, as designated persons. The estate in land would therefore form no part of the estate and effects, for and in respect of which probate duty would be payable.

COTTON, L.J. I may add with reference to what Bowen, L.J., said, that I never suggested that if an order directed things to be done which would necessitate the sale and conversion of property, that would not be effectual; but only that an order by merely saying "this to be personal estate" cannot make land money.

Judgment reversed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for defendants (the executors): *Hunters, Gwatkin & Haynes.*

Solicitors for Sir Henry Bruce Meux, Bart.: *Baker, Folder, & Upperton.*

J. E. H.

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HUTH & CO. *v.* LAMPORT AND ANOTHER.
GIBBS & SON AND OTHERS *v.* LAMPORT AND ANOTHER.

Ship—General Average—Security for Payment—Deposit.

Where a general average loss has been incurred, the contributions to which cannot be immediately ascertained, a shipowner cannot reasonably insist, as a condition for the delivery of cargo, that the consignee should pay a deposit in such a manner that the shipowner has the control over it, and can draw on it for disbursements, or to discharge claims forming part of the general average and other expenses.

SPECIAL CASE, from which the following facts are taken:—

The plaintiffs were severally consignees of cargo shipped on board the steamship *Thales*, at Buenos Ayres, for Liverpool, and the defendants were agents of the owners of the *Thales*, but were to be taken for the purposes of the case as themselves owners of the ship.

On her homeward voyage the vessel grounded near Bridport, and part of the cargo was jettisoned. By the assistance of several tugs the vessel was got off and proceeded on her voyage. On her arrival at Liverpool the defendants claimed a lien on the residue of the cargo for general average losses and other charges. The plaintiffs applied for delivery of their goods, which the defendants refused unless the plaintiffs would sign an average bond in the form known as the Liverpool average bond, and make a deposit of 10 per cent. on the estimated value of their goods, in the joint names, as provided by the form of the bond, of the defendants and their average adjuster, or in the names of the defendants alone, or in the name of the average adjuster alone. The object of having the deposit in one of these three forms is to give the shipowner the power of drawing from time to time for his disbursements.

The first-named plaintiffs refused to comply with these conditions, but were ready to sign the London form of bond and to pay 10 per cent. on the estimated value of their goods into a joint account either of themselves and the defendants, or of nominees of them both. The defendants then stated that they would accept either the Liverpool form of bond, or a deposit in

one of the three ways they had indicated. The plaintiffs thereupon paid under protest a deposit of 10 per cent., and the goods were delivered to them. The first action was brought to recover the sum so paid and damages for the detention of the goods, and it was found in the case that if the defendants were not entitled either to the Liverpool form of bond, or to a deposit in any one of the three ways, one of which they required, or to have the 10 per cent. paid before they delivered the goods, then their refusal to deliver them was unjustifiable.

The defendants did not communicate to the second named plaintiffs that they would not insist on the Liverpool bond if the deposit was paid in one of the three ways indicated. The goods were delivered up on an application made in the second action under Order L., r. 8, on payment into Court of 10 per cent. on the value to meet the lien which the defendants claimed to that extent. The object of the defendants in claiming this lien was to assert their right to a deposit on the terms already stated.

A bond similar to the London bond, a copy of which accompanied the case, has been in use for seventy or eighty years, and the deposit, where any has been required, has always been made in the joint names of shipowner and consignee. The practice in Liverpool when the voyage ends there has been for about fifteen years for the shipowner to tender and for the consignee to sign the Liverpool form of bond, and for a deposit to be made in accordance with it, but the signing of the bond is not in all cases insisted on.

The differences between the London and the Liverpool form of bond lie in the differing provisions as to deposits, and in the special provisions in the Liverpool form for referring all questions of general average, or other charges arising out of the voyage, to the average adjuster of the shipowner, with a clause as to appeal from his determination. Both bonds contain an agreement that the deposit shall be held as a security for the general average, and particular charges, but by the Liverpool bond it is further agreed that the parties in whose names the account stands may pay thereout such sums as they shall from time to time consider ought to be paid to the owners or master, on account of money actually disbursed by them or him, or to enable them or him to

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pay off and discharge claims which form part of the general average and other expenses.

If any question arose as to the reasonableness of the amount of the deposit required, the evidence as to this was to be gathered from facts stated in the case which have been omitted here. The question for the opinion of this Court was whether the defendants were liable to the plaintiffs to any and what extent.

Cohen, Q.C. (*J. Gorell Barnes* with him), for the plaintiffs, were stopped.

Finlay, Q.C. (*French, Q.C.*, with him), for the defendants. So long as the shipowner proceeds with due diligence in the matter, he is entitled to his lien: *Simonds* v. *White* (1), and it is a matter for arrangement between the parties on what terms he will part with the goods. The lien can only be got rid of by payment or arrangement. The shipowner would be liable to parties entitled to contribution if he took inadequate security, and therefore he must be the judge of what security he should take as a condition for giving up his lien: *Crooks* v. *Allan*. (2)

Cohen, Q.C., in reply. An unjustifiable demand insisted on as the condition of giving up the goods, would exonerate the consignee from making a tender: *The Norway*. (3)

MATHEW, J. It appears to me our judgment must be for the plaintiffs in each case. The case has not been stated with a view of having the question determined, whether according to the custom of merchants and the law of England a shipowner is entitled in every case where there is a claim for general average to retain the cargo until payment of the amount has been made. It might be necessary to decide that formally and deliberately if any such right had been asserted in this case by the owner of the ship. Mr. Finlay referred—I will not do more than say referred—to the matter, because he did not argue it at any length, but he appeared to say that when the time came and when the proper case arose he would be prepared to assert that the authorities shew that such a right as I have referred to exists. The only cases he was able to call our attention to, were the cases of

(1) 2 B. & C. 805. (2) 5 Q. B. D. 38.
(3) Br. & Lush. 377.

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Simonds v. *White* (1) and *Crooks* v. *Allan*. (2) It is sufficient to say that neither of those authorities in my judgment justify him in the argument that any such right exists; but in this case it is perfectly clear that no such right was insisted upon. If it had been a question of lien, and if the shipowner had called upon the consignee to deal with his lien, the question of amount would immediately have presented itself, and a more onerous and difficult position for a shipowner to place himself in cannot be imagined. He would be bound to give up the goods upon having a proper tender made to him. In order to enable a proper tender to be made, he would be bound to give the necessary information to the consignee; and then he would run very great risk of asking too much or too little, a risk to the other consignees in the one case, and a risk to the particular consignee in the other. But no such position was taken up by the shipowner. What the shipowner insisted upon was upon the bond being in the Liverpool form. He conveyed to the consignees, that he was willing to take security, but he insisted that it should be in the form of what has been called the Liverpool bond. The question presented to us, as I understand, is whether that bond is such a security as a shipowner might reasonably demand. It appears to me perfectly clear to be unreasonable in two particulars, first, in insisting upon making the average adjuster the arbitrator in the first instance with a complicated arrangement for appeal from his decision; and secondly, in insisting upon payment over of the deposit money, either to the owner of the ship himself or to the owner and some average adjuster, so that the money is placed for a time entirely out of the reach of the consignee of the goods; and that money, according to the terms of the bond, may be drawn upon by the owner of the ship, where the money is deposited in his name, or by the owner of the ship and the average adjuster whom he would name, in the event of it being deposited in the names of both of them. That form of average bond is to my mind unreasonable. The form of London bond, which we are told has existed for seventy or eighty years, appears to be a reasonable one; and I should be glad if the result of our decision were to induce the shipowners of Liverpool to have

(1) 2 B. & C. 805. (2) 5 Q. B. D. 38.

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recourse to the greater experience and wisdom of their London brethren, and adopt that form of bond.

I think our judgment must be for the plaintiffs.

SMITH, J. I am of the same opinion.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Waltons, Bubb & Johnson.*

Solicitors for defendants: *Pritchard & Son, for Thornley & Cameron, Liverpool.*

A. M.

Dec. 18.

[IN THE COURT OF APPEAL.]

MELLISS AND ANOTHER *v.* THE SHIRLEY AND FREEMANTLE LOCAL BOARD OF HEALTH.

Illegal Contract—Penalty—Right of Action—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 193—*Contract with Local Authority by Officer or Servant.*

Sect. 193 of the Public Health Act, 1875, provides that officers or servants employed by a local authority shall not in anywise be concerned or interested in any contract with such authority for any of the purposes of the Act, and that, if any such officer or servant is so concerned or interested, he shall be incapable of afterwards holding or continuing in any office or employment under the Act, and shall forfeit the sum of 50*l.*:—

Held, that the effect of this section is to render such a contract illegal, and to prevent an officer or servant of a local authority from suing on the contract.

Decision of Cave, J. (14 Q. B. D. 911), reversed.

Semble, that if, after the making of a contract with a local authority, an officer of the authority became interested in it, s. 193 would not avoid the contract.

APPEAL by the defendants from the judgment of Cave, J., at the trial of the action for the plaintiffs. (1)

The action was brought by J. C. Melliss and J. R. H. Pim, who were civil engineers, claiming to recover 530*l.* from the defendants for work done for and services rendered by the plaintiffs to the defendants, as the urban sanitary authority of the district. The plaintiff Pim was the surveyor of the defendants, he having been appointed by them to that office in the year 1881 at a salary of 150*l.* per annum. On the 14th of November, 1882, the plaintiffs wrote a letter to the defendants, offering to

(1) 14 Q. B. D. 911.

carry out as joint engineers certain drainage works which the defendants were about to construct, on the terms therein mentioned. The defendants accepted the offer by a letter of the 20th of November, 1882. Between that time and October, 1883, the plaintiffs performed work for the defendants, such as the preparation of maps and plans, under the agreement, exceeding 50*l.* in value. On the 2nd of November, 1883, the defendants, at the request of the plaintiffs, affixed their seal to a copy of a memorandum of agreement which had been previously signed by the plaintiffs, and which embodied the terms contained in the letter of the 14th of November, 1882. This agreement did not, as is required by sub-s. 2 of s. 174 of the Public Health Act, 1875, specify any pecuniary penalty to be paid in case the terms of the contract were not duly performed.

The defendants afterwards abandoned the intended works, and the plaintiffs brought the action to recover 530*l.*, which they alleged to be due to them under the agreement. The defendants resisted the action, on the grounds that there had never been a proper contract sealed with their common seal as required by sub-s. 1 of s. 174; and that the contract was made illegal by s. 193 of the Act, and therefore the action was not maintainable. (1) Cave, J., overruled the objections, and gave judgment for the plaintiffs for 378*l.* The defendants appealed.

(1) Sect. 174 provides, "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed (namely):—

(1.) "Every contract made by an urban authority, whereof the value or amount exceeds 50*l.*, shall be in writing and sealed with the common seal of such authority.

(2.) "Every such contract shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed."

Sect. 193. "Officers or servants employed under this Act by the local authority shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act."

"If any such officer or servant is so concerned or interested, or, under colour of his office or employment, exacts or accepts any fee or reward whatsoever other than his proper salary, wages, and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of 50*l.*, which may be recovered by any person, with full costs of suit, by action of debt."

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Nov. 20. *A. Charles, Q.C.*, and *J. Eldon Bankes* (*Crump, Q.C.*, with them), for the appellants. On two grounds the action cannot be maintained. (1.) There was no contract under seal as required by s. 174, sub-s. 1, before the work was commenced. (2.) The contract is made illegal by s. 193, because Pim was an officer of the board. Sect. 193 does more than impose a penalty for the breach of its provisions; it makes a contract in which an officer of the board is interested illegal, and thus renders him incapable of maintaining an action on it. *Barton* v. *Piggott* (1) is conclusive on this point. The words of s. 46 of the Act 5 & 6 Wm. 4, c. 50, to which that case related, were in substance the same as those of s. 193 of the present Act; if there is any difference, those of s. 193 are the wider. Under sub-s. 3 of s. 174 it is the duty of the surveyor to advise the board as to entering into such a contract as this; if he is in any way interested in it himself he cannot give independent advice. *Taylor* v. *Crowland Gas and Coke Co.* (2) is another authority in point. It turned upon s. 14 of the Act 44 Geo. 3, c. 98, which imposes a penalty on an unqualified person who acts as a conveyancer.

[LORD ESHER, M.R., referred to *Foster* v. *Oxford Railway Co.* (3)]

That case is distinguishable. There the intention of the Act (the Companies Clauses Consolidation Act, 1845, s. 85) was only to impose a specified penalty for a certain act. The question in each case must be, what was the intention of the legislature? In the present case the intention was to make a contract between a local authority and one of its officers illegal. The object was to prevent any opportunity of jobbery.

As to the first ground, a contract which was originally bad for want of the seal of the board cannot afterwards be converted into a good contract. Nor can it be divided into two parts, one bad, as regards the work done before the seal was affixed, and the other good, as regards the work done after the seal was affixed. *Hunt* v. *Wimbledon Local Board* (4), and *Young* v. *Corporation of Leamington* (5), apply. They decide that sub-s. 1 of s. 174 is obligatory,

(1) Law Rep. 10 Q. B. 86.
(2) 10 Ex. 293.
(3) 13 C. B. 200.
(4) 3 C. P. D. 208; 4 C. P. D. 48.
(5) 8 Q. B. D. 579; 8 App. Cas. 517.

not merely directory. Sub-s. 2 is equally obligatory, and another point in the present case is, that the contract did not specify any pecuniary penalty for non-performance.

Meadows White, Q.C., and *Muir Mackenzie*, for the plaintiffs. Sect. 193 does not contain any express prohibition of a contract between a local authority and one of their officers. A specified penalty is inflicted on the officer who is interested in such a contract, and it was not intended to inflict any further penalty, or to make the contract void. It could not have been intended that, if a local board had entered into a contract with a gas company for the supply of gas, they could escape paying for gas supplied under the contract, because one of their officers was a shareholder to a small amount in the company. *Todd* v. *Robinson* (1) shews that under such circumstances a servant of a local authority would be liable to the penalty under s. 193. And, if the contract is made void, the interest of a co-contractor, who has committed no offence, would be affected. In *Barton* v. *Pigott* (2) the doing of a specified act was prohibited, and so it was in *Cope* v. *Rowlands*. (3)

In the present case there is only a personal prohibition enforced by a personal penalty. There is nothing to make the contract illegal. Melliss at any rate is entitled to recover, even if Pim cannot. *Foster* v. *Oxford Railway Co.* (4) should be followed.

As to the other objection, the contract in fact is under seal. The ratification or authentication of the seal may be given at any time before action brought.

[LORD ESHER, M.R. But it is objected that sub-s. 2 of s. 174 has not been complied with.]

Sub-s. 2 does not apply to a contract for the exercise of judgment and skill in devising plans and carrying them into execution.

[LORD ESHER, M.R. Sub-s. 1 says "every contract made by an urban authority, &c.," and sub-s. 2 says "every such contract."]

How would it be possible to fix a penalty for not acting as engineer? It must mean "every contract to which the condition is applicable." Sub-s. 2 is not obligatory, it is only directory. There is no authority binding on this Court to the contrary. Sect. 173 gives local authorities power to "enter into any contract

(1) 14 Q. B. D. 739.
(2) Law Rep. 10 Q. B. 86.
(3) 2 M. & W. 149.
(4) 13 C. B. 200.

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necessary for carrying this Act into execution." Sub-s. 3 of the same section has been held to be only directory, and sub-s. 2 should be construed in the same way: *Nowell* v. *Corporation of Worcester*. (1)

A. Charles, Q.C., in reply. Sect. 2 of the Public Health (Members and Officers) Act, 1885 (48 & 49 Vict. c. 53), provides that, notwithstanding anything in s. 193 of the Act of 1875, "it shall not be unlawful" for any officer or servant of any local authority "to be concerned or interested in any contract with the local authority," made with such consent or approval as is therein mentioned for the purposes therein mentioned, "or to be concerned or interested in any contract with the local authority as a shareholder in any joint stock company," and does away with the penalties prescribed by s. 193 in those cases. This new enactment was passed in consequence of the decision in *Burgess* v. *Clark* (2), and it shews that the legislature considered that s. 193 made the contracts to which it referred unlawful.

The sum which was paid into Court by the defendants was sufficient to cover what was due in respect of the work done after the sealing of the contract. Sect. 174 (2) requires the work "to be done" to be stated in the contract.

Cur. adv. vult.

Dec. 18. LORD ESHER, M.R. The plaintiffs brought this action against a local board in respect of work done by them in the preparation of certain maps and plans for the defendants. Judgment was given by Cave J., for the plaintiffs. Two objections to the judgment have been taken on behalf of the defendants. The first objection is, that one of the plaintiffs is an officer or servant of the board, and he entered into a contract with the board for the making of these maps and plans, the contract being reduced into writing afterwards, and sealed with the seal of the board. The second objection is that, even if the contract was properly sealed in conformity with s. 174 (1) of the Public Health Act, 1875, it did not contain the particulars required by s. 174 (2). It is urged that by s. 193 the contract is one which, even if it is properly sealed, and even if it had contained all the particulars

(1) 9 Ex. 457. (2) 14 Q. B. D. 735.

required by s. 174 (2), cannot be sued upon by the plaintiffs, because such a contract entered into with such a person as the plaintiff Pim, however solemn may be the form in which it is drawn up, must be treated as a void contract. It is further urged, that, even if the contract cannot be considered void under s. 193, and even if it is duly sealed, yet it did not, as required by s. 174 (2), specify any pecuniary penalty to be paid in case its terms should not be duly performed, and it is said that sub-s. 2 is imperative, not merely directory, and that, if the contract does not contain the particulars mentioned in sub-s. 2, it must be considered a void contract.

I am sorry to say that, after carefully considering the matter, and after struggling against the conclusion to which I have been obliged to come, I am of opinion that this contract is void under s. 193. One of the parties interested in the contract is an officer or servant of the board, and, in my opinion, in such a case the contract is by s. 193 made void as between the parties to it. No doubt s. 193 does not in express terms say that such a contract is to be void, it only says the officers or servants of the local authority "shall not be in anywise concerned or interested in any contract made with such authority for any purposes of the Act," and then it goes on to inflict penalties on any officer or servant who is interested in the contract. It was urged that the contract was at common law a legal contract, and that, although it is forbidden by the first part of s. 193, the consequences which are to follow disobedience to that prohibition are enacted in the second part of that section, and that those consequences are only that the officer who is interested in that contract shall be incapable of holding office, and shall forfeit the sum of 50*l*. But, on looking at the cases on this subject, I think that this rule of interpretation has been laid down, that, although a statute contains no express words making void a contract which it prohibits, yet, when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be

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entered into so as to be valid at law. Such contracts as are mentioned in s. 193 may be for very small amounts or for very large amounts, and if a servant of a local authority may enter into a contract with the local authority, however large its amount, the penalties inflicted by the latter part of s. 193 seem to be wholly inadequate to the object which the legislature had in view. The legislature must have thought it wrong that such a contract should be entered into, and if that contract is not made illegal, the officer, if the contract was a valuable one, might go on with it and laugh at the penalty of 50*l.* and the loss of his office. It seems to me, considering the object of the enactment, that the intention of the legislature was, that such a contract should not be entered into so as to be legally valid. This view is supported by the words of the first part of the section "shall not in anywise be concerned or interested in," and I think the penalties subsequently inflicted do not detract from the force of those words. The amount of the penalties, as contrastedwith the nature of the subject-matter of the enactment, brings me, though I must confess with regret, to the conclusion that the contract is void, and that the plaintiffs cannot sue upon it. This renders it unnecessary to decide the point which was raised upon s. 174 (2), and we had better leave that point for further discussion. The appeal must be allowed.

COTTON, L.J. I also am of opinion that s. 193 is fatal to the claim of the plaintiffs. The rule of law which applies to cases of this kind was thus stated by Parke, B., in *Cope* v. *Rowlands*. (1) He said, "It is perfectly settled, that, where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. . . . . The sole question is, whether the statute means to prohibit the contract." And again, in *Smith* v. *Mawhood* (2), Alderson, B., said, "The question is, does the legislature mean to prohibit the act done or not? If it does, whether it be for the purposes of revenue or otherwise, then the doing of the

(1) 2 M. & W. at p. 157. (2) 14 M. & W. at p. 464.

act is a breach of the law, and no right of action can arise out of it." When the prohibition of an act is inferred from the infliction of a pecuniary penalty for the doing of the act, the question often arises whether the penalty is imposed for the purpose of preventing the act being done, or only for the purpose of making the person who does it pay a certain sum of money. But in the present case we need not consider that question, because there is an implied prohibition of the contract in the first part of s. 193. For, in my opinion, when the Act prohibits any officer or servant of a local authority being concerned or interested in any contract with the local authority, there is a clear intention to prevent any such contract from being entered into. It was evidently intended to prevent an officer of a local authority from entering into a contract which he might have advised the local authority not to enter into, if he had not been himself interested in it. Not only does the section impliedly (if it does not expressly) prohibit such a contract, but it is in accordance with the whole object of the section that the contract should be prohibited. It may be that the consequences of this construction will in some cases be very harsh, but it is our duty only to construe the Act. And, in my opinion, although penalties are imposed by the latter part of the section, that is not all which the section does; but the making of such contracts is prohibited. It may possibly be that, if an officer of a local authority became interested in a contract after it had been entered into, the contract would not be void, but he would only forfeit any benefit under the contract. But, in the present case, the officer of the board was himself contracting with the local board, and I am of opinion that such a contract is one which the law will not enforce. It is a contract by two persons, one of whom is an officer of the board, for work to be done by the two contractors jointly, and in my opinion such a contract can give the plaintiffs no right of action.

I agree with the Master of the Rolls that it is better not to express any opinion on the other point.

BOWEN, L.J. I am of the same opinion, and I cannot say that to my mind the case is open to any doubt. The established rule of law is, and always has been, that no action can be maintained on a contract which is prohibited either by the common law or by

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statute. The rule was so stated by Lord Ellenborough in *Law* v. *Hodson* (1), and it was repeated by other judges in *Taylor* v. *Crowland Gas and Coke Co.* (2) We have, therefore, only to consider whether this contract is prohibited either by common law or by statute, and whether the action is brought to enforce the contract. There is no question as to prohibition by common law, and the only question is whether the contract is prohibited by s. 193. That is a pure matter of construction. There are many similar cases to be found in the reports, but in the end we have to find out, upon the construction of the Act, whether it was intended by the legislature to prohibit the doing of a certain act altogether, or whether it was only intended to say that, if the act was done, certain penalties should follow as a consequence. If you can find out that the act is prohibited, then the principle is that no man can recover in an action founded on that which is a breach of the provisions of a statute. It seems to me plain, from the language of s. 193, that there is a prohibition of that which has been done. I think no language could be plainer, and the mere fact that certain consequences are, by the latter part of the section, attached to the illegal act, does not, in my opinion, make the previous language less clear. What would be the result if an officer or servant of a local authority became interested in a contract with the authority to which he had originally not been a party, is another matter; I am disposed to think that s. 193 would not avoid the contract in such a case. But, in the present case, an officer of the local board, with his partner, made a contract with the board which is expressly prohibited by the Act, and, however much we may regret that work has been done by them under the contract which will not be paid for, we cannot but give effect to the language of the Act: and hold that neither of them can recover upon such a contract.

I agree that it is better not on the present occasion to give any opinion as to the effect of s. 174.

Appeal allowed.

Solicitors for appellants: *Speechly, Mumford, & Co., for Lamport & Trimwell, Southampton.*

Solicitors for plaintiffs: *Keen, Rogers, & Co.*

(1) 11 East, 300. (2) 10 Ex. 293.

W. L. C.

LOWE & SONS *v.* DIXON & SONS. 1885

Contribution—Joint Adventure—Equitable Contribution in Respect of Default in Payment of a Loss by one of the contracting Parties—Judicature Act, 1873, *s.* 25, *sub-s.* 11. *Dec.* 19.

By agreement between the plaintiffs, the defendants, and Messrs. L., B., & Co., a cargo of Californian wheat was to be shipped for their joint account by the correspondents of L., B., & Co. at San Francisco, consigned to the plaintiffs at Liverpool for sale upon certain special terms; the shippers to reimburse themselves for cost and insurance of the cargo by drafts on the plaintiffs at sixty days' sight to the extent of 45*s.* per quarter, less freight, and for the balance of invoice amount by separate drafts at sixty days' sight upon each of the above parties for one-third of the excess.

The cargo was shipped, and a bill was drawn by the San Francisco house for 29,353*l.* 18*s.* 1*d.* on account of the invoice price of the wheat, less freight, upon the plaintiffs, and was duly accepted and paid by them, together with freight, insurance, and other charges in respect of the cargo; and the wheat on arrival was sold by the plaintiffs at a loss.

In December, 1883, L., B., & Co. became insolvent and compounded with their creditors for 30 per cent. of their liabilities, which composition the plaintiffs received, leaving an unpaid balance of 1760*l.* 10*s.* 9*d.* due from that firm for their share of the loss on the adventure:—

Held, upon further consideration (the judge to draw inferences of fact), that the purchase and shipment of the wheat was a joint partnership adventure, each of the three firms to participate equally in the profit or loss; and that the defendants, according to the rule of equity, which since the Judicature Act, 1873, is to prevail, were liable to contribute equally with the plaintiffs to make good the default of L., B., & Co.

THIS was an action upon an agreement entered into between the plaintiffs, the defendants, and Messrs. Lund, Beveridge, & Co., for the purchase on account of the three firms of a cargo of Californian wheat, to be shipped at San Francisco and consigned to the plaintiffs at Liverpool for sale by them on account of the three firms respectively in equal shares.

The case was tried before Lopes, J., at the last assizes at Liverpool, when a verdict was entered for the plaintiffs subject to further consideration in London. It was argued before the learned judge by *Frederic Thompson*, and *Mansfield*, for the plaintiffs, and by *Kennedy*, *Q.C.*, and *Dickinson*, for the defendants.

The agreement sued upon and the facts and arguments sufficiently appear in the judgment, which, after time taken to consider, was delivered by

LOPES, J. This case came on to be tried before me at the last

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assizes at Liverpool, when it was agreed that a verdict should be taken for the plaintiffs, and the case stand over for further consideration in London. I was to be at liberty to draw inferences of fact. The evidence was in substance as follows:—

In December, 1882, an agreement was entered into between the plaintiffs (the owners of the ship *Downshire*), the defendants, and Messrs. Lund, Beveridge, & Co., for the purchase of a cargo of Californian wheat, to be shipped from San Francisco and consigned to the plaintiffs for sale. The terms of the agreement were contained in a letter of the 24th of December, 1882, written by Lund, Beveridge, & Co. to the plaintiffs, as follows:—

"We hereby beg to advise you that in terms of arrangement between your good selves, Messrs. Thomas Dixon & Sons, Belfast, owners of the ship *Downshire*, and ourselves, our San Francisco house, Messrs. Henry Lund & Co., have chartered the said ship, now there, for our joint account, at 37*s.* 6*d.* freight to this port (Belfast) direct, usual San Francisco charterparty,—and that they have bought for our joint account to load this ship there with despatch 5–7000 qrs., about $1 white 82 Cali. wheat, at $1.77 per 100lbs., and 9–11,000 do. at $1.76¼ ditto. It is understood that Messrs. Henry Lund & Co. charge the joint interest and loss of interest incurred by them, and that they have liberty to reject of the wheat purchased so much as may not prove of quality contracted for, and also that they then substitute to the best advantage of all concerned suitable wheat. The above-mentioned arrangement is that Messrs. Henry Lund & Co. reimburse themselves for cost and insurance of this cargo by drawing as usual at 60 days' sight, with documents, on your good selves, payable in London, to the extent of 45*s.* per quarter of 500 lbs., less freight, and for balance of invoice amount by separate drafts at 60 days' sight upon each of the above parties for one-third the excess. The margin of (say) about 1*s.* per quarter to be kept up, if required by you, by each of the other parties interested in their respective shares. You to have the full discretionary power of sale, and to be paid a commission of 2 per cent. *a. i. f.* for financing, selling, and guaranteeing, including brokerages, charging the joint interest with Bank commission and all other expenses actually incurred by you. The ship to get the freight

stipulated for above, paying Henry Lund & Co. their 2½ per cent. commission on same, and to ourselves 2½ per cent. ditto here commission on insurance for the benefit of Henry Lund & Co."

A cargo of wheat was purchased and shipped per the *Downshire*, and consigned to the plaintiffs. A draft was drawn upon the plaintiffs for the sum of 29,353*l.* 18*s.* 1*d.* on account of the invoice-price of the wheat less freight, which draft the plaintiffs accepted. The plaintiffs duly paid the acceptance at maturity, and also freight, insurance, and other charges in respect of the cargo.

In June, 1883, the *Downshire* arrived in Liverpool, and the cargo was received by the plaintiffs. Subsequently the cargo was sold at a loss.

On the 31st of December, 1883, Lund, Beveridge, & Co. became insolvent, and they subsequently entered into an arrangement with their creditors to pay a composition of 30 per cent. of the amount of their liabilities. The plaintiffs received the sum of 568*l.* 12*s.* 2*d.*, being 30 per cent. of Lund, Beveridge, & Co.'s one-third share of the estimated loss on the cargo of wheat. The total amount of the contribution payable by Lund, Beveridge, & Co. in respect of the sale of the cargo of wheat, after deducting 568*l.* 12*s.* 2*d.* received by the plaintiffs, amounts to 1760*l.* 10*s.* 9*d.*

The plaintiffs claim from the defendants one-third share of the loss accruing on the wheat, after giving them credit for the net proceeds of the portion of the cargo sold on their account, for the defendants' share of the proceeds of the wheat sold on their account, and a sum of 750*l.* paid by the defendants to the plaintiffs. The plaintiffs also claim one-half of the sum of 1760*l.* 10*s.* 9*d.*, being the balance of the share of such loss payable by Lund, Beveridge, & Co., and remaining unpaid. The sums so claimed amount to 1445*l.* 12*s.* 7*d.*

If the wheat was jointly purchased by the plaintiffs, the defendants, and Lund, Beveridge, & Co., for re-sale with a view to divide the profits arising from the transaction, there would be a partnership, and the defendants would be liable to pay the amount claimed.

It is contended for the defendants that the money paid by the plaintiffs was not a joint expenditure for a common or a partner-

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ship adventure, but a payment for the whole treated as an advance to each separately.

I cannot adopt that view. After a very careful perusal of the correspondence, I think the parties intended the purchase to be a partnership transaction with a view that they should all according to their respective shares participate in any loss or profit that might arise. I can put no other construction on the words "joint account" and "joint interest" used in the letter of the 22nd of December, 1882, which contains the contract.

Mr. Kennedy, in his able argument placed great reliance on the provision in the contract with regard to the one-third margin, and argued that the proper inference to draw from that provision was that the whole payment was to be treated as an advance to each of the three separately. I cannot draw that inference in the face of what appears to be the clear and unambiguous terms of the contract.

It is contended by the defendants that there was afterwards a varied or substituted agreement. I can see no evidence of any such new agreement. If it was a purchase on a joint or partnership account, it is perfectly clear that the defendants are liable to contribute in respect of Lund, Beveridge, & Co.'s share.

At law, if several persons have to contribute a certain sum, the share which each has to pay is, the total amount divided by the number of contributors; and no allowance is made in respect of the inability of some of them to pay their shares. But, in equity, those who *can* pay must not only contribute their own shares, but they must also make good the shares of those who are unable to furnish their own contribution. Inasmuch, therefore, as the rules of equity prevail (1), the defendants must make good each one-half of that which Lund, Beveridge, & Co. are unable to pay.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Bateson, Bright, & Warr, Liverpool.*

Solicitors for defendants: *Hill, Dickinson, Lightbound, & Dickinson, Liverpool.*

(1) Judicature Act, 1873, s. 25, sub-s. 11: "In all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter, the rules of Equity shall prevail."

J. S.

[IN THE COURT OF APPEAL.]

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THE QUEEN *v.* RUDGE AND OTHERS.

Practice—Appeal, Court of—Jurisdiction—Criminal Matter, Judgment in—19 & 20 Vict. c. 16—Judicature Act, 1873, *s.* 47.

No appeal lies to the Court of Appeal from the refusal of the Queen's Bench Division to grant a certiorari to remove an indictment to the Central Criminal Court under 19 & 20 Vict. c. 16.

APPEAL from the refusal by the Queen's Bench Division to grant an application for a certiorari under 19 & 20 Vict. c. 16, to remove an indictment for murder from the assizes at Carlisle to the Central Criminal Court.

Cavanagh, by way of appeal, moved for a certiorari. He cited *Reg.* v. *Weil* (1); *Reg.* v. *Steel* (2); *Reg* v. *Foote.* (3)

THE COURT (Lord Esher, M.R., Cotton and Bowen, L.JJ.) were of opinion that the decision appealed from was clearly a judgment in a criminal matter within the 47th section of the Judicature Act, 1873, and therefore that there was no appeal. Accordingly they refused the application.

Application refused.

Solicitor for appellants: *E. H. Biggin, for T. Johnson.*

(1) 9 Q. B. D. 701. (2) 2 Q. B. D. 37.
(3) 10 Q. B. D. 378.

E. L.

1886
Jan. 13.

[IN THE COURT OF APPEAL.]

JOHNSTONE *v.* MILLING.

Contract, Breach of, by Repudiation before Time for Performance—Declaration of Inability to perform—Election, Breach at—Landlord and Tenant—Lease, Covenant to rebuild in.

In a lease of premises for a term of twenty-one years determinable by the lessee at the end of the first four years by a six months' notice, the lessor covenanted to rebuild the premises after the expiration of the first four years of the term upon a six months' notice from the lessee requiring him to do so. Before the expiration of the first four years of the term the lessor on many occasions told the lessee that he would be unable to procure the money for rebuilding the premises. The lessee in consequence of this statement by the lessor gave the requisite notice under the provisions of the lease to determine the term at the end of the first four years. After the determination of the lease he continued to occupy the premises for some months, paying rent to the lessor's mortgagees, on the chance, as he stated, of the lessor's procuring the money to rebuild. The lessor being, however, unable to rebuild the premises, the lessee claimed damages against him for breach of the contract to do so:—

Held, that, the covenant to rebuild never having been actually broken, because the lessee had before the time for its performance determined the term, he could not recover unless there had been a breach of contract by anticipation within the doctrine of *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q.B.) 455) and *Frost* v. *Knight* (Law Rep. 7 Ex. 111) by reason of a wrongful repudiation of his covenant by the lessor before the time for performance; that what had been said by the lessor did not under the circumstances of the case amount to such a repudiation; and that, if it did, such repudiation before the time of performance arrived would not amount to a breach of the contract, unless the lessee elected to treat it as putting an end to the contract except for the purposes of an action for such breach, and the lessee had not under the circumstances so elected; and that he could not therefore maintain his claim.

Quære, whether the doctrine of *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q.B.) 455), can be applicable to the case of a lease or other contract containing various stipulations where the whole contract cannot be treated as put an end to upon the wrongful repudiation of one of the stipulations of the contract by the promisor.

APPEAL from the order of the Queen's Bench Division directing that judgment should be entered for the defendant on the counter-claim for damages to be ascertained by a reference.

The defendant in the action set up a counter-claim for damages for breach of a covenant contained in a lease by which the plaintiff covenanted with the defendant to rebuild the demised

premises. The reply stated, among other things, that the plaintiff had not received any notice to rebuild from the defendant as required by the terms of the covenant, and also that the lease was surrendered by the defendant before the time at which the obligation to rebuild would have arisen.

The action was, after issue joined, remitted to the county court for trial.

The facts with regard to the claim are immaterial to this report.

The facts with regard to the counter-claim appeared at the trial to be as follows:—In June, 1881, premises, of which the plaintiff was owner subject to certain mortgages, were demised to the defendant by the plaintiff and his mortgagees for the term of twenty-one years from the 12th day of May, 1880, subject to a proviso for sooner determination of the same, the rent being by the terms of the lease made payable to the plaintiff, until the mortgagees gave notice to the lessee in writing to pay it to them, and, upon such notice being given, to the mortgagees. The lease contained a covenant by the plaintiff that after the expiration of the first four years of the term the plaintiff would, on receipt from the lessee of six calendar months' notice in writing requiring him so to do, forthwith proceed to rebuild the premises within the period and in the manner specified by the covenant. It was provided that the lessee might at the end of the first four, seven, or fourteen years of the lease determine the same by giving to the person or persons for the time being in the receipt of the rent six calendar months' notice in writing of his intention so to do.

The defendant gave the requisite notice to determine the lease at the end of the first four years. He stated in evidence at the trial that during his tenancy he spoke to the plaintiff constantly about getting the money to rebuild the premises; that the plaintiff said he was unable to do so, but that he expected a loan society who had a second mortgage on the premises might advance money: that the plaintiff's declaration of inability to get the money for rebuilding extended over the last two years and a-half of the defendant's tenancy; that he made it constantly in answer to the defendant's direct question, and at other

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times in conversation both before and after the expiration of the four years; and that it was in consequence of such declaration that he (the defendant) gave notice to determine the lease. The defendant further stated that he continued to occupy the premises for about three months after the determination of the lease paying rent to the mortgagees: that after the lapse of the lease the plaintiff came to him and voluntarily told him that he was utterly unable to find the money: but that he (the defendant) continued the tenancy on the chance of the plaintiff's getting the money.

The county court judge found that the plaintiff had been unable to find the money to rebuild the premises; that the plaintiff both before and after the surrender of the lease told the defendant that he was unable and would be unable to find the money for rebuilding the premises; that the defendant in consequence of the plaintiff stating that he was and would be unable to find the money for rebuilding the premises surrendered the lease; and that the defendant suffered damage by such surrender. The defendant's counsel submitted on those findings that the defendant was entitled to a verdict on the counter-claim.

The county court judge, however, held the contrary, and found a verdict both on the claim and on the counter-claim for the plaintiff, and entered judgment accordingly.

A rule nisi for a new trial was obtained by the defendant in the Queen's Bench Division: and the Divisional Court (Huddleston, B., and Cave, J.), upon the argument of the rule made the order against which the plaintiff appealed.

Foote, for the plaintiff. The conditions upon which the right to the performance of the covenant to rebuild depended never were fulfilled. The defendant never gave a notice to rebuild, and himself put an end to the term before the obligation to rebuild accrued. The defendant relies on the doctrine acted upon in the case of *Frost* v. *Knight* (1), and contends that there was in this case a breach of the contract before the time for performance arrived, on the ground that the plaintiff had renounced and expressed his intention of not performing the contract.

The county court judge does not find that the plaintiff re-

(1) Law Rep. 7 Ex. 111.

nounced the contract, but only that he said that he should be unable to find the money for rebuilding. It is submitted that there was no evidence of a repudiation of the contract within the meaning of the doctrine relied on by the defendant.

There is nothing to shew that the plaintiff was not perfectly willing to perform the contract if he could get the means of doing so. It ought not to be assumed that it was not possible that in some way or other he might have raised the money before the time for rebuilding came. As an honest man he informed the defendant that he did not expect to be able to get the money, but that does not amount to a repudiation of the obligations of the contract. Assuming that what the plaintiff said did amount to a repudiation of the covenant and refusal to be bound by it, the doctrine relied upon has no application to the case of repudiation of one of the covenants of such a contract as a lease. *Frost* v. *Knight* (1) is the first case in which this doctrine was ever applied to an obligation dependent upon a contingency. In *Hochster* v. *De la Tour* (2) and the other previous cases on the subject the obligation to perform was certain to arise. It has been held that the breach of such a covenant as this does not entitle the lessee to throw up the lease: *Surplice* v. *Farnsworth.* (3) It is essential to the applicability of the doctrine of anticipatory breach of contract as laid down in the cases that the promisee should have elected to treat the announcement of the promisor's intention not to perform it as a wrongful putting an end to the contract. He cannot treat the contract as still subsisting, and yet sue the promisor as for a wrongful rescission of the contract. And for this reason the doctrine in question cannot apply to the case of such a contract as a lease, because the lessee cannot elect to treat the whole contract as put an end to. However this may be, it is submitted that the defendant in this case did not, in fact, elect to treat the contract as rescinded; he continued tenant and subsequently gave notice under the lease to determine the term. If the promisee does not elect to treat the promisor's announcement of intention not to perform as a wrongful putting an end to the

(1) Law Rep. 7 Ex. 111. (2) 2 E. & B. 678; 22 L. J. (Q.B.) 455.
(3) 7 M. & G. 576.

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contract, and treats the contract as still subsisting, he lets in the promisor to claim the benefit of any subsequent contingency under the contract which may prevent a breach from arising. In the present case, the lease was determined before the obligation to rebuild could arise.

Brooke Little, for the defendant. An announcement by the promisor in positive terms that he will be unable to perform the contract when the time for performance arrives is surely in substance equivalent to an announcement of intention not to perform: see per Bramwell, L.J., in *In re Phœnix Bessemer Steel Co.* (1) The effect, so far as the position of the promisee is concerned, ought, according to reason and justice, to be the same. The proper inference to be drawn from the plaintiff's declaration as a matter of fact is that he announced his intention not to perform the covenant because he knew that he should not be able to do so. It is submitted that the finding of the county court judge amounts to this if fairly and reasonably interpreted with reference to the evidence. [He cited on this point *Cort* v. *Ambergate Ry. Co.* (2)] It is contended that the principle of *Hochster* v. *De la Tour* (3), and the subsequent cases that followed it, is merely that, as soon as the promisor announces that he either cannot or will not when the time comes perform the contract, the promisee may treat such announcement as an immediate breach, and take any step he can to minimise the damage. He is thereby absolved from performance of any conditions precedent to the arising of the particular obligation repudiated. So here the defendant was not bound to give notice to the lessor to do what he had already said he should not be able to do; nor was he bound to continue tenant till the time for performance arrived. The damages would have been much greater if he had continued tenant of the premises in their existing condition, and his giving notice to determine the term was really for the benefit of the lessor. It would be unreasonable that he should be bound to continue tenant when, the lessor being insolvent, he could never recover the damages that would result to him from so doing.

The defendant did elect to treat the plaintiff's declaration of

(1) 4 Ch. D. 108, at p. 122. (2) 17 Q. B. 127, at p. 140.
(3) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

inability to rebuild as a breach of the covenant, for the county court judge finds that he in consequence elected to surrender the term at the end of the four years. There is no reason why the doctrine of *Hochster* v. *De la Tour* (1) should not apply to a covenant contained in a contract such as a lease which contains other covenants and stipulations. The substance of the doctrine is merely that a promise may be considered as broken by anticipation so as to enable the parties to minimise the damage. There is no reason why this doctrine should be confined to cases where the whole contract can be rescinded upon the renunciation by one party of an obligation under it.

[LORD ESHER, M.R. Can you cite any case in which the doctrine of anticipatory breach has been applied where the whole contract could not be treated as put an end to?]

It is submitted that there is nothing in reason to prevent the application of the doctrine to such a case.

Foote, in reply. Giving the notice to determine the lease could not be evidence of an election to treat the contract as wrongfully determined by the plaintiff, because such notice could only be given under the contract. Apart from the provision in the lease entitling the defendant to give this notice he could not have given it, for the breach of the covenant to rebuild would not entitle him to throw up the lease.

LORD ESHER, M.R. The question before us arises entirely on the counter-claim. The claim therein set up is for damages for breach of a covenant in a lease whereby the landlord undertook to rebuild the premises upon notice. It is quite clear that there was no breach of the covenant in the ordinary sense of the term, because no notice to rebuild had been given, and the tenant had exercised the right given him by the lease of putting an end to the term at the expiration of the first four years, and consequently the lease was determined before the time at which the obligation to rebuild under the covenant would have accrued. The lease being so put an end to, it is quite clear that the lessee could not sue the lessor for breach of the covenant in not rebuilding after the expiration of the four years. That being so, the cause

(1) 2 E. & B. 678; 32 L. J. (Q.B.) 455.

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of action is thus shaped on behalf of the defendant. It is alleged that a breach of the contract was committed by the plaintiff before the end of the four years, inasmuch as he had declared that he was unable and would be unable to find the money for rebuilding when the time came. It is insisted that such declaration amounted to a declaration of his intention not to perform the contract, and was intended as a repudiation of it, or that, if it was not so intended, the expressions used by the plaintiff were such that the defendant was entitled to treat them as equivalent to a repudiation of the contract; and it is accordingly contended that there was a breach of the contract by anticipation before the time for its performance arrived, for which the defendant was entitled to damages, and that the fact that the defendant afterwards exercised his option of determining the lease is immaterial, for in so doing the defendant only acted for the benefit of the landlord in order to minimize the damages arising from his repudiation of the contract. The evidence shews, and the county court judge has found as a fact, that the lessor did a considerable time before the expiration of the four years, in answer to the questions of the lessee, repeatedly say that he was unable and would be unable to find the money for rebuilding, and the judge finds that in consequence the defendant surrendered the lease. It appears, however, from the evidence that he did not at once throw up the lease and give the premises into the hands of the plaintiff, but that he waited till the last six months of the four years and then gave the requisite notice to determine the term in accordance with the provisions of the lease. Upon these findings the county court judge decided that the defendant could not maintain his counter-claim. The case then went to the Divisional Court, which held that, either upon those findings, or on the inferences that ought to be drawn from them, the defendant had a right of action on the covenant, and therefore that the county court judge was wrong. Now on what principle can it be that the defendant had a right of action on the covenant? As I have said, it cannot be on the ground that there was a breach of the covenant in the ordinary sense of the term, because the defendant never gave any notice to rebuild, and he put an end to the term, so that the time when the covenant was to be performed never arrived.

Accordingly the defendant has recourse to the doctrine laid down in several cases cited, the best known of which is perhaps the case of *Hochster* v. *De la Tour*. (1) In those cases the doctrine relied on has been expressed in various terms more or less accurately; but I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue. Such appears to me to be the only doctrine recognised by the law with regard to anticipatory breach of contract. We are asked, as it seems to me, by the counsel for the defendant to lay down a new principle, but I do not think we can do so consistently with the established doctrines of law on the subject. We have therefore to consider

(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

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whether the defendant can bring his case within the doctrine as to anticipatory breach of contract as already laid down. The first question is whether the plaintiff intended to repudiate the contract when he made the statements relied upon with regard to his inability to find the money for rebuilding. Did he mean to say that, whatever happened, whether he came into money or not, his intention was not to rebuild the premises? It does not seem to me that what he said naturally leads to the inference that such was his intention, and I think, having regard to the terms of his finding, that the county court judge declined to draw that inference. If he declined to do so, I think we ought not to do so, unless it is a necessary inference from what the plaintiff said. It does not appear to me that it is. If we ought not to draw that inference from what the plaintiff said, it seems to me to follow as a matter of course that the defendant was not entitled to draw it: and the result is that the defendant fails in the very first point which it is necessary for him to establish, viz., that the plaintiff at the time when he made these declarations of his inability to find the money for rebuilding intended to repudiate his liability on the contract, or that he made use of expressions entitling the defendant to suppose that he did so. That being so, his case is gone; but, assuming the contrary, then comes the question whether the defendant elected to treat the plaintiff's statement as a wrongful repudiation of the contract. That involves first of all the question whether he could so treat it. The contract made between the plaintiff and the defendant was the whole lease. The covenant in question is a particular covenant in the lease not going to the whole consideration. If there were an actual breach of such a covenant at the time fixed for performance, such breach would not, according to the authorities, entitle the tenant to throw up his lease. That being so, I do not hesitate to say, though it is not necessary in this case to decide the point, that an anticipatory breach could not entitle him to do so, that and it does not appear to me that he could elect to rescind part of the contract. Therefore it seems to me that the defendant could not elect to put an end to the contract in consequence of what the plaintiff stated. But, whether he could do so or not, it seems to me that in fact he did not. He did not

renounce the lease or give up the premises. He did not do any act which affected the existence of the contract. He made no declaration of intention to treat it as rescinded except for the purpose of bringing his action upon it. On the contrary, at the time fixed by the contract he gave the requisite notice to determine the lease. I think, therefore, that on every point necessary to establish his counter-claim the defendant fails. For these reasons, with great deference to the Divisional Court, before whom these points do not appear to have been developed so clearly as they have been before us, I think their decision cannot be supported, and that the judgment of the county court judge was correct.

COTTON, L.J. In this case the defendant set up a counter-claim in respect of the alleged breach of a covenant in a lease of premises by the plaintiff to the defendant. The county court judge at the trial arrived at certain findings, upon which he gave judgment in favour of the plaintiff, but which in the opinion of the Divisional Court entitled the defendant to judgment. By the terms of the lease the obligation of the landlord on the covenant to rebuild the premises could not arise till after the expiration of four years, at which period, under the provisions of the lease, the lessee might, and in fact did, determine the term by six months' notice. Under these circumstances, if an action were brought against the landlord for breach of covenant in respect merely of his not rebuilding after the expiration of four years, it would be impossible to maintain that there was such a breach of covenant, for the covenant clearly is only to rebuild if the defendant continued tenant, and the defendant had himself put an end to the tenancy. But it is said that, before the defendant gave the notice to determine the tenancy and before the end of the four years, matters happened which were sufficient to entitle the defendant to maintain an action on the covenant to rebuild. The county court judge finds that both before and after the surrender of the lease (meaning, as I understand, by the term "surrender" the notice to determine the lease), the plaintiff told the defendant that he was unable and would be unable to find the money for rebuilding the premises. The

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Divisional Court thought that this declaration amounted to such a repudiation of the contract by the plaintiff before the time for performance had arrived as to entitle the defendant in accordance with the doctrine laid down in the case of *Hochster* v. *De la Tour* (1) to bring an action for breach of the contract. That doctrine seems to be that, where a party to a contract has made statements before the time for performance has arrived importing a refusal to perform or be bound by the contract, the other party, if he chooses, may elect to act upon such statements as a renunciation of the entire contract, and may thereupon treat the same as a breach of the contract and bring his action. If he so elects, his election relieves the other party from any further obligation under the contract and enables both parties to make arrangements for the future on the footing that the contract has been once for all broken and is at an end. The law is thus stated by Cockburn, C.J., in the case of *Frost* v. *Knight* (2): "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster* v. *De la Tour* (1) and *Danube and Black Sea Company* v. *Xenos* (3) on the one hand, and *Avery* v. *Bowden* (4), *Reid* v. *Hoskins* (5), and *Barwick* v. *Buba* (6), on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own: he remains subject to all the obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it: on the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful

(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

(2) Law Rep. 7 Ex. 111.

(3) 13 C. B. (N.S.) 825; 31 L. J. (C.P.) 284.

(4) 5 E. & B. 714; 26 L. J. (Q.B.) 3.

(5) 6 E. & B. 953; 26 L. J. (Q.B.) 5.

(6) 2 C. B. (N.S.) 563; 26 L. J. (C.P.) 280.

putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." That expression of the law was cited with approval by Keating, J., in the case of *Roper* v. *Johnson*. (1) It must be taken therefore that the law is that, when one party has done an act which amounts to a wrongful renunciation of the contract and the other has acted upon it as such, there is a cause of action in respect thereof, but, when the other has not done so, then both the parties, as well he who has attempted to renounce the contract as he who asserts its existence, are entitled to the benefit of its provisions.

The Divisional Court in the present case treated the statements made by the plaintiff as a renunciation of the contract within the doctrine I have mentioned. I cannot say I think they were right in so doing. But, assuming that they were, I can find no case which shews that the doctrine in question applies to the renunciation of one particular covenant or stipulation in a contract such as a lease, which contains many. And, as at present advised, I am not favourably impressed with the view that the doctrine would apply to the case of a lease where the tenant cannot, in consequence of the refusal by the landlord to perform a particular covenant, put an end to the entire contract. But, however that may be, we have first to arrive at the conclusion that there was a renunciation of the contract. If the county court judge had found that there was such a renunciation, it might have been necessary to decide the other questions as to the effect of it, but all that is stated in the finding is that the plaintiff said that he was and would be unable to find the money for rebuilding. Whether such a statement amounted to a renunciation of the contract must depend on the circumstances of the case and the nature of the contract. Here the plaintiff, though not a monied man, was the owner of the property included in the lease subject to mortgages, and there might be, and seems to have been, some expectation on his part of getting the money for the purpose

(1) Law Rep. 8 C. P. 167.

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of rebuilding advanced on the property by the mortgagees. It seems to me that it would be a reasonable construction of his statements that they rather meant that he was afraid, and was under the impression that he would not be able to get the money than that he did not intend to perform the contract even if he could get it. The county court judge does not find that he renounced the contract, and, that being so, we ought not, I think, to put that construction on what he said. The evidence, as appearing on the judge's notes, seems to me rather contrary to that construction, because it would seem from the defendant's own evidence that he did not himself so understand the plaintiff's statements, for he says that he continued the tenancy after the lease expired on the chance of the plaintiff's getting the money. The defendant appears to have thought it on the whole the best course to act on the contract and not to treat it as at an end, but to give notice under it to determine the lease before the time arrived at which the plaintiff's obligation to rebuild was to arise. It seems to me, therefore, that there was nothing amounting to a renunciation of the contract by the plaintiff, and that, if there were, the defendant did not adopt it but treated the contract as still existing. For these reasons, I think the decision of the Divisional Court was wrong.

BOWEN, L.J. I am of the same opinion. The question which we have to decide arises with regard to the defendant's counterclaim. The claim made by the defendant is upon a covenant by which the plaintiff undertook, after the expiration of four year from the commencement of the term, to rebuild the premises upon notice from the defendant to do so. The defendant says that before the time had arrived for the performance by the plaintiff of this obligation he repudiated his liability on the contract, and so conferred an immediate right of action on the defendant. We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor not to carry out the contract when the time for performance arrives, may treat the contract as broken, and sue for the breach thereof. It would seem on principle that the declara-

tion of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as brutum fulmen, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such. Upon looking to the reason of the thing it seems obvious that in the latter case the rights of the parties under the contract must be regarded as culminating at the time of the wrongful renunciation of the contract, which must then be regarded as ceasing to exist except for the purpose of the promisee's maintaining his action upon it; it would be unjust and inconsistent with all fairness that the promisee should be entitled to bring his action as upon a wrongful renunciation of the contract, and yet to treat the contract as still open and existing with regard to the future. Such being the reason of the thing, the authorities seem all to be the same way. In *Hochster* v. *De la Tour* (1), Lord Campbell thus expresses the doctrine: "But it is surely much more rational and more for the benefit of both parties that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it." In the passage cited by my Brother Cotton from *Frost* v. *Knight* (2), Cockburn, C.J., points out that there are these two alternatives open to the promisee, and that it is a condition essential to his right to sue upon a repudiation of the contract before the time for performance as upon a breach that he should thenceforth treat the contract as at an end except for the purpose of being sued upon. Such being the doctrine on the

(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455. (2) Law Rep. 7 Ex. 111.

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subject, the question arises whether it is applicable to the case of a lease. It has been decided in *Surplice* v. *Farnsworth* (1) that a tenant could not throw up his tenancy on the breach of a stipulation that the landlord should put the premises in repair. No one ever yet heard of an attempt to put an end to a lease in respect of a breach of covenant except in cases where the term was made dependent upon the performance of the covenant as a condition. No case has been cited in which it has been sought to apply the doctrine of *Hochster* v. *De la Tour* (2) to such a case as this, or to any case where the promisee sought to keep open the contract after the alleged repudiation by the promisor, and also to sue for damages for such repudiation as for a breach. It is not necessary to decide the point, but I very much doubt whether the doctrine of *Hochster* v. *De la Tour* (2) is applicable in such a case as this between lessor and lessee. Apart, however, from this question, I think that the Court below were wrong with regard to the inferences of fact which they drew. The claim being for wrongful repudiation of the contract it was necessary that the plaintiff's language should amount to a declaration of intention not to carry out the contract, or that it should be such that the defendant was justified in inferring from it such intention. We must construe the language used by the light of the contract and the circumstances of the case in order to see whether there was in this case any such renunciation of the contract. It seems to me that the county court judge was of the contrary opinion, and, looking to the whole history of the transaction, I cannot say that he was wrong. Unless the language of the plaintiff can only reasonably be construed as importing such renunciation, I think the Court below ought not to have disregarded the finding, and treated what the plaintiff said as amounting to a renunciation of the contract within the doctrine to which I have alluded. Further, assuming that there was evidence to support a finding that what the plaintiff said was a renunciation of the contract, there does not seem to me to be a tittle of evidence to shew that the defendant ever elected to treat it as such, and all reason and authority, as I have said, appear to me to shew that he must so elect to

(1) 7 M. & G. 576. (2) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

treat it, in order that it may constitute a breach of the contract. It appears to me, therefore, that the case for the defendant entirely fails. For these reasons I think that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Prior, Church, & Adams.*
Solicitors for defendant: *Darley & Cumberland.*

E. L.

[IN THE COURT OF APPEAL.]

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Dec. 18.

THE VESTRY OF ST. JOHN, HAMPSTEAD *v.* COTTON.

Sewers—Expense of constructing—Owners of Land abutting on "Street"—"New Street"—Metropolis Management Acts, 1855 (18 & 19 *Vict. c.* 120), *s.* 250; *and* 1862 (25 & 26 *Vict. c.* 102), *ss.* 52, 53, 112.

Sect. 52 of the Metropolis Management Act, 1862, enacts that where any sewer shall be constructed for the drainage of any "new street," the expense shall be defrayed by the owners of the land abutting on such street.

Sect. 53 enacts that where any sewer shall be constructed in a street in which there has been no sewer, but where sewers-rates have been levied previously, the expense shall be defrayed in part only by the owners of the houses situate in and of the land abutting on such street; provided that no street or property, in respect of which sewers-rates have been levied for five years prior to the 1st of January, 1856, shall be subject to be charged under this section.

Sect. 112 enacts that ". . . the word 'street' shall be deemed to apply to and include the subject-matters specified in the 250th section of" the Metropolis Management Act, 1855 . . . "the expression 'new street' shall apply to and include all streets to be formed or laid out" after the 7th of August, 1862.

Sect. 250 of the Metropolis Management Act, 1855, enacts that "the word 'street' shall include any highway (except the carriageway of any turnpike road) . . ."

Before the year 1826 a road had been repaired out of the rents and profits of certain lands, which had been settled for its maintenance, and by a statute passed in that year and also by another statute passed in 1829 tolls were collected on the road. In the year 1872 the road ceased to be a turnpike road. The defendant's land abutted on the road: it was mostly building land, but only one house had been erected upon it. The plaintiffs in the year 1883 constructed in front of the defendant's land a sewer in the road; there had been no sewer before that time. Sewers-rates had been levied for five years prior to the 1st of January, 1856, in respect of the whole of the property, of which the defendant was owner. The plaintiffs apportioned part of the cost of making the sewer upon the defendant:—

Held, that the road was a "street," as defined by s. 112 of the Metropolis

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Management Act, 1862; and that the word "street" in s. 53 of that statute included "new streets" as defined by s. 112 as well as old streets; that s. 52 did not apply; and that the defendant was not liable to pay any part of the sum apportioned upon him in respect of his land.

Vestry of St. Giles, Camberwell v. *Weller* (Law Rep. 6 Q. B. 168, n.) and *Sheffield* v. *Fulham Board* (1 Ex. D. 395) approved and followed; *Sawyer* v. *Paddington Vestry* (Law Rep. 6 Q. B. 164) dissented from.

By the Queen's Bench Division (Pollock, B., and Manisty, J.), the principle of the decision in *Plumstead Board of Works* v. *British Land Company* (Law Rep. 10 Q. B. 203) applies to the case of making a sewer as well as to the case of paving a road.

SPECIAL CASE stated in an action brought by the above-named vestry of St. John, Hampstead, to recover from the defendant the sum of 2162*l.* 0*s.* 5*d.*, claimed from him as his proportion of the expense of constructing and making a sewer under part of the Edgeware Road.

1. The defendant is owner within the meaning of the Act 25 & 26 Vict. c. 102 (subject to the questions arising on this special case) of certain messuages or dwelling-houses, lands, and hereditaments mentioned in the apportionment hereinafter referred to as follows:—

	Feet of frontage.	Amount apportioned.		
		£	*s.*	*d.*
Dent de Lion Road . .	40 0	39	6	3
Kingsgate Lodge . . .	190 6	187	6	6
Private road to Kingsgate Lodge	13 6	13	5	6
Land extending southward from the boundary of the parish of Hendon	1953 0	1920	9	0

The messuages, lands and hereditaments abut on the east side of Edgeware Road in the parish of St. John, Hampstead. The boundary between that parish and the parish of Willesden runs down the centre of the Edgeware Road for a considerable distance, including that part of the road whereon the land and hereditaments of the defendant abut, and where the sewer hereinafter described was constructed.

2. Edgeware Road was in existence during the reign of Queen Elizabeth, and in her reign estates were settled by one John Lyon, the founder of Harrow School, for the maintenance of the

road as a roadway for traffic from the town of Edgeware to London.

3. Subsequently in the year 1610 Edward Harvist gave certain lands to trustees to employ the rents and profits in repairing the Edgeware Road. By the Metropolis Roads Act, 1826, the said road and other roads in the neighbourhood of the Metropolis north of the river Thames were placed under the care of certain commissioners appointed under that Act, and under that Act and the Metropolis Road Act, 1829, the rents and profits of the lands given by Lyon and Harvist as aforesaid became payable to those commissioners, and from the time of the passing of those Acts tolls were collected on the road by the commissioners. Subsequently, by the Metropolis, Kilburn, and Harrow Roads Act, 1872 (35 & 36 Vict. c. xlix.), the income from the above-named estates was divided in certain proportions amongst the parishes in which the Edgeware Road was situated, and the vestry have since the year 1872 received and do now receive their proportion thereof. By the last-mentioned Act the Edgeware Road ceased to be a turnpike road, and was made a public or common highway. The road was to be maintained and repaired by the parishes in which it is situated in accordance with Schedule C to the above Act. In pursuance of resolutions passed by the plaintiffs a brick sewer, with all necessary gullies and side entrances, was constructed by them in that portion of the Edgeware Road which is situate within the parish of St. John, Hampstead, and abuts on the defendant's lands. The construction of the sewer was completed in 1883, previously to which there had been no sewer in this part of the Edgeware Road. The sewer was constructed for the purpose of draining houses and other erections within the plaintiff parish then erected or thereafter to be erected on the aforesaid lands of the defendant and other lands abutting on the east side of Edgeware Road aforesaid. The house and premises known as Kingsgate Lodge was erected about the year 1838 by a predecessor in title of the defendant. There are no houses at present erected fronting on to the Edgeware Road or draining into the sewer on the pieces of land hereinbefore mentioned to have a frontage thereto of 1953 feet, and these pieces of land remain fenced off from the Edgeware Road by a hedge and ditch which have existed for very

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many years. The last-mentioned pieces of land contain together about thirty-four acres, and are bounded towards the east by the main line of the Midland Railway Company, and may and probably will within a few years be laid out and become available as a building site, and the plaintiffs in view of such contingency, but not at the request of the defendant, constructed the sewer of a larger size than would have been necessary for the drainage of existing buildings.

4. The Dent de Lion Road was made some years since by the defendant or his predecessor in title, in order to the development of his estate as a building estate and the erection of houses and other buildings on the same. The road is at right angles to the Edgeware Road, and leads therefrom to another road called the Fordwych Road, also made by the defendant or his predecessor in title, and intersecting the estate in a direction more or less parallel to the Edgeware Road. The Fordwych Road terminates at the north end in an old highway called Mill Lane, and at the south end in Maygrove Road, both leading out of the Edgeware Road. Two stables have been erected on the side of the Dent de Lion Road, but no other building has yet been erected thereon, and a great number of houses have been erected on the side of Fordwych Road, to which the Dent de Lion Road forms, or when open will form, one of the principal means of access from the Edgeware Road. The Fordwych and Maygrove Roads are all open roads, and no rent or other payment is made to the defendant or any other person for the use thereof, or of the Dent de Lion Road. Maygrove Road and a part of Fordwych Road are and have been since they were constructed in fact public highways, so far as the defendant and his predecessor in title by any act of theirs could dedicate them to the public, and were constructed before the sewer was constructed. Dent de Lion Road was also made before the construction of the sewer, and was then and has ever since remained open and dedicated to the public in like manner as aforesaid, except that a temporary and moveable barrier has been recently erected across the same at a point about twenty yards from the Edgeware Road by an adjoining owner, and with the tacit assent of the defendant, in order to prevent trespass by gipsies and others on the open land. The

Dent de Lion Road was approved and allowed by the Metropolitan Board of Works to be formed and laid out as a new road on the 15th of December, 1882. Dent de Lion Road has never been, and only a small part of Fordwych Road has been taken to or repaired by the plaintiffs, or by any road authority, as a public highway.

5. Sewers-rates were levied for five years prior to the 1st of January, 1856, in respect of the whole of the property, of which the defendant is such owner as aforesaid.

6. The total cost of the said brick sewer was ascertained and fixed at the sum of 5329*l.* 3*s.* 6*d.*, and the plaintiffs have resolved that the vestry should and would bear one-third part share, and they have paid the same out of rates levied by them according to law.

7. The plaintiffs have further resolved that the remaining two-third parts should be borne and paid by the landowners in the parish of St. John, Hampstead, in proportion to their frontage on the sewer, to be paid by them in one sum.

8. The amount payable by the defendant in proportion to his frontage, if he is liable in respect of the whole thereof, is 2162*l.* 0*s.* 5*d.*

The question for the opinion of the Court was—

Whether the sum of 2162*l.* 0*s.* 5*d.*, or some part thereof was due and payable by the defendant to the plaintiffs.

May 21. *Philbrick, Q.C.* (*W. English Harrison,* with him), for the plaintiffs.

Lumley Smith, Q.C. (*James G. Wood,* with him), for the defendant.

The following cases were cited: *Sawyer* v. *Paddington* (1); *Sheffield* v. *Fulham Board* (2); *Maude* v. *Baildon Local Board* (3); *Plumstead Board of Works* v. *British Land Company.* (4)

POLLOCK, B. It seems to me that except in respect of the forty feet frontage to Dent de Lion Road, which would yield an amount of 39*l.* 6*s.* 3*d.*, the plaintiffs are entitled to our judgment.

I will deal with that Dent de Lion Road first, as I am upon it.

(1) Law Rep. 6 Q. B. 164.
(2) 1 Ex. D. 395.
(3) 10 Q. B. D. 394.
(4) Law Rep. 10 Q. B. 203.

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That case seems to me to come within the decision which was last cited, of *Plumstead Board of Works* v. *British Land Company* (1), in the Exchequer Chamber. Although that was a case of paving and not of sewage, there was nothing which altered the application of the interpretation clause, as applied in that Act, from its application to a case which relates to a sewer. In that case it was, after considerable discussion, held, that the mere owner, in the sense of being the owner of the soil, of land which has been dedicated as a highway, is not owner within the meaning of the Act. That decision did not turn upon the question whether there was a street or not, but, on whether a man can be said to be the owner of land when the land in question is dedicated as a highway; and the word "owner" is said to mean in s. 250 of the first Act, that of 1855, "the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account, or as agent or trustee for any other person, or who would receive the same if such lands or premises were let at a rack-rent." Mr. Philbrick very properly said, that he does not mean to contend that that means that anything like an ancient highway is in contemplation as the place which might sometimes be let at a rack-rent. It means if the land should lie idle and unlet the owner is to be liable. It seems to me as to the forty feet that the defendant is not liable.

With regard to the rest, I really have very little to say, because I think that this case clearly comes within the judgment of the learned judges who decided the case of *Sawyer* v. *Paddington*. (2) The question was very closely gone into there. Blackburn, J., disposes of the difficulty raised in this case by Mr. Lumley Smith as to the previous rating, by saying that "the effect of this construction of the section would be that if meadow land had been subject to sewer-rate, however small, for five years, before the 1st of January, 1856, and were afterwards built upon, the expense of draining the streets would have to be borne by the whole parish." I cannot think that Mr. Lumley Smith's contention on that part of the statute is correct; and, as to the rest, I can only say, I think that the matter was put upon a very clear and sound ground

(1) Law Rep. 10 Q. B. 203. (2) Law Rep. 6 Q. B. 164.

both by Blackburn and Lush, JJ.; and, if their judgment be correct, we think it is a matter that is concluded. Therefore, I think, that except as to the sum I first mentioned, our judgment should be for the plaintiffs.

MANISTY, J. I am of the same opinion.

Judgment for the plaintiffs.

A. M.

The defendant appealed.

Nov. 21, 23. *Lumley Smith, Q.C.*, and *James G. Wood*, for the defendant. The question in this case is, whether the cost of constructing the sewer in the Edgeware Road is to be paid for pursuant to the provisions of s. 52 or of s. 53 of the Metropolis Management Act, 1862. The plaintiffs contend that s. 52, which in terms relates to "new streets," is applicable; but the defendant relies upon s. 53, which, he contends, applies to both old and new streets. The word "street" is alone used in s. 53, but this word is sufficient to include a "new street," and ought not to be restricted to old streets; and as sewers-rates had been levied for five years before the 1st of January, 1856, in respect of the defendant's property, it is under the last clause of s. 53 wholly exempt. The decisions in *Vestry of St. Giles, Camberwell* v. *Weller* (1); *Sheffield* v. *Fulham Board* (2), are in point, and ought to be followed.

But, further, the Edgeware Road is not a "street" at all: it is only a country road, and was a mere turnpike road when the Metropolis Management Act, 1862, was passed.

Philbrick, Q.C. (*W. English Harrison*, with him), for the plaintiffs. If the argument for the defendant is correct, s. 52 of the Metropolis Management Act, 1862, is superfluous. The plaintiffs rely upon *Sawyer* v. *Paddington*. (3) The reasoning of the judges in the two cases relied upon by the defendant is unsatisfactory and fallacious. The Edgeware Road is a "new street" within the meaning of s. 52, and s. 53 must be confined to old streets.

Moreover the Edgeware Road was a turnpike road, but in 1872

(1) Law Rep. 6 Q. B. 168, n. (2) 1 Ex. D. 395.

(3) Law Rep. 6 Q. B. 164.

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it ceased to be so: it therefore is a "new street" within the Metropolis Management Act, 1862, s. 112, which is to be interpreted by the aid of the Metropolis Management Act, 1855, s. 250. It may be that the Edgeware Road, where it passes the defendant's property, is not a street in the ordinary sense of the word, but the question is to be determined by the enactments contained in the statutes referred to. *Robinson* v. *Local Board for Barton-Eccles* (1) was a decision under the Public Health Acts; but its principle applies to the Metropolitan Management Acts.

Lumley Smith, Q.C., in reply.

Cur. adv. vult.

Dec. 18. The following judgments were delivered:—

LORD ESHER, M.R. This is an appeal by the defendant against a decision, which has made him liable to pay for part of the cost of a sewer. The facts of the case for the purpose of our judgment seem to be these: the defendant is the owner of land bordering upon the road, which leads from London through Edgeware to the north: that road was formerly a turnpike road: the turnpike having been taken away, the road became a mere highway: the defendant is, therefore, the owner of land bordering upon a highway: the sewer has been constructed by the local authority rather in anticipation of what will be its future use: it will eventually be used, no doubt, for the draining of houses, when they come to be built in the neighbourhood, and it is used for the draining of houses which now exist: the piece of land which belongs to the defendant, and in front of which a great part of this sewer goes, is not as yet much built upon, although there are houses on the London side of it and houses beyond. I should say that this part of the road is not yet a street in the ordinary sense of the term. The order has been made upon the defendant under s. 52 of the Metropolis Management Act, 1862. It is argued for the defendant that the road where the sewer is made is not in any sense a street, and therefore, as I understand the argument, is not even within s. 53; but it is also said for him that even if it is a "new street"—because the turnpike has been taken away not very long ago—nevertheless in this point of view

(1) 21 Ch. D. 621; 8 App. Cas. 798.

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it must be also a "street"; and it is further said for the defendant that even if otherwise he would be under s. 52 liable, yet s. 53 of the Act absolves him from liability.

I have said that this part of the road does not seem to me to be a street in the ordinary sense of the term. But, what is or is not a "street" under the Metropolis Management Act, 1862, depends upon the definition of a "street" in s. 112 of that Act. A street according to that definition "shall be deemed to apply to and include the subject matters specified in the 250th section of the firstly recited Act:" that is the Metropolis Management Act, 1855. Now, one part of the definition of a street in the 250th section is this: "The word 'street' shall apply to and include any highway (except the carriageway of any turnpike road)." Having read that part of the definition of the word, I come to the conclusion that the Edgeware Road is at least a highway, it not being now a turnpike road; and that the moment it ceased to be a turnpike road, it became a "street" within this definition.

The Edgeware Road being then a "street," it seems to be also a "new street" within s. 112 of the Metropolis Management Act, 1862, the turnpike having been taken down since it was passed; and we must look at ss. 52 and 53 of that statute, and consider what is their effect. The matter depends, I think, really upon s. 53. The Edgeware Road is a road along which there ran an open ditch, which was used for the purpose of draining; and I cannot help thinking that that ditch was an open sewer. If it was not, then there was no sewer. So that the case falls within s. 53, which says, "where any sewer shall be constructed by any vestry or district board in a street, in which previously to such construction there had been no sewer, or only an open sewer." The question for decision in this case has really come to this: whether we shall adopt the view of the Court of Queen's Bench in one case, or the view of the Court of Exchequer and of the Court of Appeal from Inferior Courts in two cases, as to the true construction of this s. 53, and we must determine whether in our view it applies only to old streets, or whether it applies to both kinds of streets. I think, as far as I am concerned, that this case must be decided upon an old, simple, and very plain rule;

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and that is to read the language of an Act of Parliament in its ordinary and natural sense, unless there be something which enables a judge to read it in a different sense. The word "streets" must primâ facie include both old and new streets; and when I find that "streets" and "new streets" are both mentioned in the Metropolis Management Act, 1862, and are distinguished in that Act, and when I find in s. 53 these words, "where any sewer shall be constructed . . . . in a street," I ask myself whether I am entitled to put in the word "old" before the word "street," and whether where the Act of Parliament contemplates both kinds of streets and also deals with the general words "in a street," that expression in ordinary English does not include both "old" and "new" streets. To my mind it does. I can find nothing in the statute, which enables me to read that expression otherwise than according to its ordinary English sense. I think, therefore, that it becomes perhaps really immaterial for me to consider whether the Edgeware Road is an old street or a new street, because s. 53 applies to both kinds of streets.

We must determine, as it seems to me, whether we shall adopt the decision of the Court of Appeal from Inferior Courts in *Sheffield* v. *Fulham Board* (1), which is a decision of Lord Bramwell and Denman, J., or whether we shall adopt the decision of the Court of Queen's Bench in *Sawyer* v. *Paddington* (2), which was decided by Lord Blackburn and Lush, J. From what I have said, it is obvious that I adopt the view of the Court of Appeal from Inferior Courts; and I think that s. 53 applies to both kinds of streets; and, therefore, I must say, with deference, that I agree with the decision in *Sheffield* v. *Fulham Board* (1); and that I do not agree with the decision of the Court of Queen's Bench in *Sawyer* v. *Paddington*. (2) I think, therefore, that the defendant is not liable in this action, and that we must reverse the decision of the Court below, so far as it was in favour of the plaintiffs.

COTTON, L.J. I am of the same opinion.

There are two points: is this a "street" at all within the meaning of the Metropolis Management Act, 1862, and, if it is, does it come under s. 52 or under s. 53?

(1) 1 Ex. D. 395. (2) Law Rep. 6 Q. B. 164.

I entirely agree with the Master of the Rolls that Edgeware Road is a street. It is not what we call a street in ordinary language; but within the definition of the Metropolis Management Act, 1855, it is a "street," as it is a highway not being a turnpike road. But it is said that we must look at what existed at the time when the Metropolis Management Act, 1862, was passed, and when the turnpike existed, which has since been taken away. In my opinion, as soon as that was taken away, then the Edgware Road came within the definition of s. 250 of the Metropolis Management Act, 1855; and from that time, though it was not before, it became a "street" within the meaning of the Acts.

Then comes the question under ss. 52 and 53 of the Metropolis Management Act, 1862, which is a longer and more difficult question. As to this, we have opinions of great judges on either side. In my opinion we must exercise our own intelligence, and say what the true construction of these sections is. If s. 53 applies only to an old street, s. 52 will apply to Edgeware Road, which is a "new street." In support of this view, that s. 53 extends only to old streets, it was said that s. 52 applies expressly to "new streets," and s. 53 must have been intended to apply to something different; and, therefore, it must be applied only to "old" streets. In my opinion there is a fallacy in that argument. By construing s. 53 in its ordinary language it will apply to any kind of street, that is to say, whether new or old; but it does not apply to all old streets, or to all new streets; it only applies to those streets where there have been previously no sewers, and where sewer-rates have been levied previously to the construction of new sewers, as is contemplated by the section. It is a very reasonable way, to my mind, of construing the Act of Parliament to say that s. 52 applies to "new streets" generally, but with the exception that where a "new street" has not had any sewer in it, and where, nevertheless, sewer-rates have been paid, s. 53 applies to that particular class of "new streets" as well as to old streets, which are in the same position of not having had a sewer, but, nevertheless, of having had sewer-rates levied. It might have been a better mode of expressing the intention of the legislature if the order of the sections had been reversed, but, to my mind, there is no difficulty, because one

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section, namely, s. 53, applies where there is a new street with no sewer, but where sewer-rates have been levied in that new street; and it applies also to old streets, which are in the same position as regards the absence of a sewer, and as regards the levying of rates; and s. 52 will apply to those new streets, which do not come within the special provision or, as it may be termed, within the exception contained in s. 53. That being so, in my opinion s. 53 does apply, and as it is stated here and found as a fact that sewer-rates have been levied for more than five years before the 1st of January, 1856, this clause at the end of s. 53 exempts the defendant from being charged under its preceding provisions; and as he falls within s. 53, he cannot be chargeable under s. 52. I may add that if our opinion is correct, s. 52 will apply to every "new street," which does not come within the qualification contained in s. 53; but that wherever that qualification is to be put in force, the liability of the owner of land abutting on the "new street" must not be taken as governed by s. 52, although that section, but for s. 53, would have applied to every kind of "new street."

In my opinion, therefore, this appeal must be allowed.

BOWEN, L.J. I am of the same opinion.

The first question is whether this is a street. A street in the ordinary sense of the word it is not. But the legislature in the Metropolis Management Acts includes in the term "streets" not merely streets in the popular sense, but also those streets which have become "streets" by the operation of the statutes. A highway becomes by the statutes a "street," as soon as it ceases to be a turnpike road.

Then we have only to consider whether this statutory street falls under s. 53 or not. Now, according to the plain words of the legislature, if we read s. 53 in its ordinary sense without reading anything else into it from any other section, the expense of constructing sewers, where there has been before only an open sewer, in any street, whatever kind of street it may be, is governed by that section. To read any other words into the section which would limit its operation, is a performance in which we only ought to acquiesce, if we are driven to it by necessity. It seems to me

that there is no necessity to give a forced interpretation to s. 53, in order to make s. 52 perfectly intelligible. For that reason it seems to me that the decisions of the Court of Exchequer and of the Court of Appeal from Inferior Courts are to be preferred to the decision of the Court of Queen's Bench.

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Judgment for the defendant.

Solicitor for plaintiffs: *W. Gribble.*
Solicitors for defendant: *A. F. & R. W. Tweedie.*

J. E. H.

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Oct. 30

Criminal Law—Extradition—33 & 34 Vict. c. 52—Larceny Act, 24 & 25 Vict. c. 96, s. 75—Fraudulent Misappropriation—"Banker, merchant, broker, attorney, or other agent"—Habeas Corpus—Practice.

In 24 & 25 Vict. c. 96, s. 75,—which enacts that whosoever, having been intrusted as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith and contrary to the object or purpose for which such chattel, security, &c., was intrusted to him, sell, negotiate, &c., or in any manner convert to his own use or benefit such chattel or security, shall be guilty of a misdemeanor,—the words "or other agent" apply to persons whose occupation is similar to those enumerated in the section, and do not include any ordinary agent who may from time to time be intrusted with valuable securities.

Where, therefore, the prisoner, who was not a banker, merchant, broker, or attorney, was employed by the prosecutors, who were railway contractors, to procure for them a contract for the construction of a foreign railway, and was charged under s. 75, with having misappropriated valuable securities with which the prosecutors had intrusted him in the course of his employment:—

Held, that the facts disclosed no offence within the meaning of the section, and that the prisoner was not liable to be committed with a view to his extradition.

APPLICATION for a writ of habeas corpus to obtain the release of one Joaquim Maria de Almeida Portugal, who had been arrested under an extradition warrant granted by Sir James Ingham, a metropolitan police magistrate, and committed to prison with a view to his extradition in respect of an offence committed in France.

It appeared that in 1884 the prisoner was employed by Messrs.

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Lucas & Son, railway contractors, for commission, to use his influence to obtain for them a contract for the construction of a railway and docks in France. They intrusted him in the course of his employment with a cheque for 500*l.* for the purpose of opening a credit in their name in one of two specified banks in Paris. It was alleged that he had fraudulently appropriated this cheque to his own use; and he was further charged with having fraudulently dealt with a bill for 250*l.* and other securities which had been intrusted to him for a special purpose. The magistrate, after hearing the evidence, committed the prisoner, the warrant of committal describing the offence "for that, the prisoner having been intrusted as agent with divers valuable securities for a special purpose without any authority to negotiate the same, did in violation of good faith, and contrary to the purpose for which such securities were intrusted to him, unlawfully negotiate and convert the same to his own use."

Oct. 28. *Sir J. Gorst, S.G.* (*R. S. Wright*, and *Danckwerts* with him), shewed cause. The evidence before the magistrate was sufficient to warrant the committal of the prisoner for an offence within the second branch of 24 & 25 Vict. c. 96, s. 75. (1)

Tickell, in support of the rule. To justify the committal under the Extradition Act, it was incumbent on the prosecutors to offer primâ facie evidence that the money and securities which the prisoner was charged with having misappropriated were intrusted to him in the capacity of "agent," that is, a person who carries on the business or occupation of an agent, and intrusted with

(1) 24 & 25 Vict. c. 96, s. 75: "Whosoever, having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or *other agent*, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund whether of the United Kingdom or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, &c., for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall, in violation of good faith and contrary to the object or purpose for which such chattel, &c., was intrusted to him, sell, negotiate, pledge, &c., or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security, or the proceeds of the same or any part thereof, &c., shall be guilty of a misdemeanor," &c.

them in that capacity, and without authority to sell, pledge, or negotiate, and not one who upon one solitary occasion acts in a fiduciary character: *Rex* v. *Prince* (1); *Reg.* v. *Cooper* (2); *Reg.* v. *Tatlock* (3); 2 Russell on Crimes, 5th edit. 390.

Sir John Gorst, S.G., in reply. It was as agent, and as agent only, that the prisoner was intrusted with the cheque and the acceptance. *Rex* v. *Prince* (1) was decided upon s. 2 of 52 Geo. 3, c. 63, the words of which are different from those of s. 75 of 24 & 25 Vict. c. 96. The judgment of Amphlett, B., in *Rex* v. *Tatlock* (3), is in favour of the view taken by the magistrate.

Cur. adv. vult.

Oct. 29. The judgment of the Court (MATHEW and SMITH, JJ.) was delivered by

SMITH, J. In this case the Solicitor-General shewed cause yesterday before my brother Mathew and myself against a rule nisi obtained by Mr. Tickell, calling upon the Crown to shew cause why a writ of habeas corpus should not issue to bring up the body of Joaquim Maria de Almeida Portugal, now in custody under a warrant of commitment by Sir James Ingham.

The prisoner was so committed in order that he might be extradited to France pursuance to the provisions of 33 & 34 Vict. c. 52.

The charges against the prisoner were for having committed offences within the meaning of s. 75 of the Larceny Act, 1861, 24 & 25 Vict. c. 96.

Three points were made on behalf of the prisoner: 1. Whether the circumstances under which he was intrusted in the year 1884, with a cheque for the sum of 500*l.* to open a credit at one of two banks in Paris, and his subsequent dealings therewith, constituted an offence within the second part of the 75th section,—2. Whether the drawing by the prisoner upon the prosecutors and the subsequent dealing with the bill for 250*l.* in the year 1885, constituted, under the circumstances deposed to in evidence, an offence within the first part of the said section,—3. Whether the prisoner was

(1) M. & M. 21; 2 C. & P. 517. (2) Law Rep. 2 C. C. 123.
(3) 2 Q. B. D. 157.

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"an agent" within the meaning of either branch of the said section.

We are of opinion that, apart from the third point,—about which more hereafter,—there was good evidence to justify a commitment by the chief magistrate as to the prisoner having committed an offence within the second part of the section.

We give no opinion as to whether the evidence disclosed any offence to have been committed by the prisoner within the first branch of the section; nor is it necessary for us to do so: and we are by no means clear that the chief magistrate committed the prisoner for any such offence.

Whether the prisoner was "an agent" within the meaning of the second branch of the 75th section depends upon the following considerations:—

The material words of the section are as follows:—Whosoever, having been intrusted "as a banker, merchant, broker, attorney, or *other agent*, with money or security for the payment of money, or with any chattel or valuable security," &c., "shall (to use a short term) embezzle the same, shall be guilty of a misdemeanor." The question is, what is the meaning of the term, "or other agent."

The prisoner in this case was not a banker, merchant, broker, or attorney; nor was he intrusted with the 500*l.* or the 250*l.* in any such capacity. He had heard and thought it probable that a contract to construct a certain railway in France might be obtained; and he put himself in the year 1884 into communication with the prosecutors, who then agreed with him that, in the event of his obtaining the contract for them, they would give him the sum of 10,000*l.* It was in or about the endeavouring to obtain this contract, and the negotiation thereof, that the two sums of money viz., the 500*l.* and 250*l.*, with other moneys or securities, got into the possession of the prisoner, and were misappropriated, as it is alleged, by him.

It was contended by the Crown, that, although the prisoner was not either a banker, merchant, broker, or attorney, and although he was not intrusted with either sum of money in any of those capacities, yet he came within the term, "other agent intrusted with money or valuable security" within the meaning of s. 75.

To this it was answered that, if that contention of the Crown be correct, the section should have said, "whosoever, having been intrusted as agent with any money," &c.; that no interpretation or effect would be given to the words "banker, merchant, broker, or attorney;" and that, it was obvious that some effect must be given to those words, if possible, in construing the section, for otherwise the section might be held to apply to everybody intrusted with money to be applied as by the section is provided. In this we agree. We notice that the Larceny Act, a portion of the 75th section of which we are called upon to construe, after in earlier sections classifying various places and things from and of which larceny may be committed,—see ss. 31, 38, 40, 50, 60, 62, and 63,—proceeds to specify certain classes of persons who may be guilty of the offences therein described; for instance, from s. 67 to s. 73, clerks, servants, or persons in the public service are classified; in s. 74, tenants and lodgers are classified; and in s. 75 and afterwards the class aimed at is that of agents, bankers, factors. In our judgment s. 75 is limited to a class, and does not apply to everyone who may happen to be intrusted as prescribed by the section, but only to the class of persons therein pointed out.

Moreover, the words of the section are not "banker, merchant, broker, attorney, or agent," but "or *other* agent," pointing, in our opinion, to some agent of like kind with the class before enumerated. In our judgment, the "other agent" mentioned in this section means one whose business or profession it is to receive money, securities, or chattels for safe custody or other special purpose; and that the term does not include a person who carries on no such business or profession, or the like. The section is aimed at those classes who carry on the occupations or similar occupations to those mentioned in the section, and not at those who carry on no such occupation, but who may happen from time to time to undertake some fiduciary position, whether for money or otherwise.

This construction, in our judgment, gives due weight to each of the words of the section, which the contention of the Crown does not.

We should notice that the case of *Reg.* v. *Prime* (1) is a strong

(1) 2 C. & P. 517; M. & M. 21.

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authority tending to shew that the view taken by us of s. 75 is the correct one. Notwithstanding the authority upon 52 Geo. 3, c. 63, in the year 1827, subsequent statutes have been passed, down to and including the Larceny Act, 1861, all employing, as to the point now under discussion, very similar language to that used in 52 Geo. 3, c. 63; and it seems to us that if by the Larceny Act, 1861, the legislature had intended to give the wide construction now contended for by the Crown to the words "other agent," it certainly would not have used the words it has used.

The case, too, of *Reg.* v. *Cooper* (1), though distinguishable from the present upon the ground pointed out by the Solicitor General, as far as it goes is an authority in favour of the prisoner.

In our judgment the prisoner in the present case is not an "agent" within the meaning of s. 75 of the Larceny Act, 1861, and therefore the rule must be made absolute.

Rule absolute. (2)

Solicitors for the Crown: *Hare & Fell.*

Solicitor for prisoner: *Powles.*

(1) Law Rep. 2 C. C. 157.

(2) The prisoner having been brought up in custody on the return, and a motion having been made for his discharge from custody—

Oct. 30. *Sir J. Gorst, S.G.* (*R. S. Wright,* and *Danckwerts,* with him), opposed the application on the ground that the magistrate had signed two warrants of committal, both dated the same day, the first, as already stated, charging the prisoner with an offence under 24 & 25 Vict. c. 96, s. 75; but the second describing the offence generally as "fraud by an agent," and that the evidence justified a committal under the second warrant, — for it shewed that the prisoner had been guilty of an offence under arts. 405, 408 of the French Penal Code, and also of fraudulent conversion as bailee within 24 & 25 Vict. c. 96, s. 3.

Tickell, for the prisoner.

THE COURT (Day and Smith, JJ.) ordered the prisoner to be discharged, on the ground that reading the two warrants together, the offence described generally as "fraud by an agent" in the one must be taken to be the same as that more particularly described as an offence under 24 & 25 Vict. c. 96, s. 75, in the other. The Court also expressed their opinion that the point was one which ought to have been raised on the application for the habeas corpus, and they stated that in future they would only hear arguments against the application for a habeas corpus upon the understanding that there should be no further argument when the prisoner came up for his discharge.

J. S.

THE QUEEN ON THE PROSECUTION OF THE BERWICK HARBOUR COMMISSIONERS, APPELLANTS; THE ASSESSMENT COMMITTEE OF BERWICK-UPON-TWEED UNION, RESPONDENTS.

1885 Dec. 19.

Poor-rate—Harbour Duties—Soil of Harbour not belonging to Commissioners—Duty comprising Harbour Duty and Additional Duty for use of Wet Dock—Rateability.

Commissioners were appointed by a local Act of Parliament for the improvement of a harbour, with power to impose tonnage dues upon all ships using the harbour, and other dues called shore dues on goods shipped from or landed on the quays. The soil of the harbour did not belong to the commissioners, but that of the quays was vested in them, and they were accordingly rated to the poor-rate in respect of the shore dues but not in respect of the tonnage dues. By a subsequent Act the commissioners were empowered to construct a wet dock, and fresh dues were substituted for those previously authorized, the shore dues on goods being much the same as those which previously existed, except that additional dues were payable on completion of the wet dock on goods loaded or discharged in the dock, or exported or imported in vessels of a tonnage of 100 tons or upwards, and new tonnage dues for vessels entering or leaving the harbour; those for vessels under 100 tons being practically the same as those previously imposed, and those for vessels above 100 tons being higher, and it was also provided that for every vessel entering the wet dock there should be an additional tonnage duty:—

Held, that in assessing the commissioners to the poor-rate in respect of the dock, the additional dues paid by ships entering the dock ought only to be taken into account, and not the harbour duty payable by such vessels exclusive of the additional dues.

Reg. v. *Kingston-upon-Hull Docks* (7 Q. B. 2) distinguished.

UPON appeal to the Berwick Borough Sessions by the Berwick Harbour Commissioners against a poor-rate for the parish of Tweedmouth, the recorder ordered the rate to be amended subject to a case.

The question raised by the case was, whether the harbour duty and tonnage duty (other than the additional dues payable by vessels entering the wet dock) which are chargeable under the Berwick-upon-Tweed Harbour Acts, 1862 and 1872, upon vessels entering the harbour of Berwick-upon-Tweed, so far as such duties were payable in respect of vessels entering the harbour and moored at the Carr Rock on entering the wet dock, were to be taken into account in enhancing the rateable value of the appellants' premises.

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The facts are fully stated in the head-note and in the judgments of the Court.

Dec. 1. *J. L. Walton* (*R. Cunningham Glen* with him), for the respondents. The construction of the wet dock by the respondents under the powers of their special Act and the creation of additional dock dues makes the whole harbour and tonnage duties rateable—for the additional dues, together with the previous harbour dues, form one undivided charge. *Reg.* v. *Hull Docks Co.* (1) is undistinguishable. There in the case of a harbour like the present one and docks, it was held that the whole harbour duty was practically earned by the docks, and ought to be taken into account in ascertaining the rateable value. There is no ground for dividing the harbour duty, on the supposition that a vessel might possibly discharge her cargo in the harbour without entering the dock. It is not contemplated that the dock shall be self-supporting, but it is intended to be maintained by the earnings of the whole concern.

E. Ridley, (*F. D. Blake*, with him), for the appellants. *Reg.* v. *Hull Docks Co.* (1) is distinguishable. There the dock dues could not be separated from the harbour duty properly so called. Here the dock dues are for the use of the docks only, and before the completion of the docks the same tonnage dues were paid as those now payable, and it is clear that the old tonnage dues were not rateable. [He cited *New Shoreham Commissioners* v. *Overseers of Lancing*. (2)]

J. L. Walton, in reply, cited *Rex* v. *Regent's Canal Co.* (3)

Cur. adv. vult.

Dec. 19. The following judgments were delivered:—

CAVE, J. The only point raised for our consideration upon the argument of this appeal was whether in assessing the Berwick Harbour Commissioners to the poor-rate in respect of their dock buildings and plant, the tonnage dues and harbour duty received by them under the Harbour Act, 1872, are to be taken into account.

(1) 7 Q. B. D. 2. (2) Law Rep. 5 Q. B. 489.
(3) 6 B. & C. 720.

It appears that in the early part of this century the pier formerly built to shelter Berwick harbour from storms had gone to decay, whereby the harbour was much exposed to storms, and the navigation at the entrance thereof was much impeded by sand banks and other obstructions, and in danger of becoming altogether unfit for the purposes of trade. The legislature thereupon interposed, and by 48 Geo. 3, c. civ., appointed commissioners with power to improve the navigation of the harbour by deepening it and removing obstructions, and to make and erect jetties, capsterns, and other engines and posts for preserving the navigation and rendering it more safe and commodious, and to make quays and docks for the better accommodation of the shipping and the trade of the port. The commissioners were also empowered (s. 31), to make regulations for the navigation of the harbour, and of all vessels resorting thereto, and for the loading and delivering of goods, and for the quays under their authority, and for the laying of goods thereon. For the purpose of providing funds for the undertaking the commissioners were empowered (s. 33), to demand and collect (A) certain rates or duties on goods, and on ballast imported into or exported from the harbour, and also (B) certain rates or duties of tonnage on ships using the harbour for trading purposes or shelter.

By s. 42, the commissioners were empowered to let these rates and duties, either from year to year, or for any term not exceeding seven years.

This Act was repealed by the Berwick Harbour Act, 1862, and from the recitals contained in the later Act it appears that the commissioners had re-erected the pier and kept it in repair, and had erected a lighthouse and quays, wharves, jetties, and offices, and had provided steam tugs, buoys, moorings, anchors, and dolphins, and had kept in repair the previously existing quays and wharves, and had removed various sand banks and other obstructions and annoyances to the navigation within the harbour. By s. 14, the commissioners were empowered to erect all such piers and other works authorized by the repealed Act as had not then been erected, or as the commissioners thereafter might deem it necessary to erect, and to maintain the piers and works already erected, or thereafter to be erected. By s. 49, they were empowered

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to dig and remove sand, gravel, or clay, in any part of the harbour, and by s. 50, to dredge any banks, shoals, or channels within the harbour, for the better maintaining and improving the navigation thereof, and to remove any other obstructions and impediments. By s. 66, they were empowered to demand and collect certain rates and duties on goods and on ballast imported into or exported from the harbour, and also certain rates or duties of tonnage, which latter were only one-half the amount of those given by the earlier Act, except the harbour duty, which in each case was 3*s.* 4*d.* on every ship coming into the harbour. The soil of the harbour was not vested in the commissioners by either Act.

So far the case is comparatively free from difficulty. The commissioners were empowered to improve the navigation of the harbour, the soil of which was not vested in them and received certain rates and duties of tonnage from all ships using the harbour. They were also empowered to construct quays and landing places which were vested in them, and received certain rates or duties on all goods shipped from or landed on these quays and landing places. The tonnage rates and duties were granted for and arose from the use of the land covered with water which the commissioners did not occupy. The rates and duties on goods were granted for and arose from the use of the quays and landing places; and consequently, where the commissioners were the occupiers of the quays and landing places, these rates and duties on goods were in the nature of profits arising from the land so occupied and were rateable.

We have, however, to deal with the new conditions introduced by the Act of 1872, which by s. 4, empowered the commissioners to make and maintain a wet dock, an embankment below high water-mark, a quay or quays, an entrance into the dock, a gangway, and an access to the quay and all necessary subsidiary works. They were also empowered (s. 20) to purchase fisheries in the harbour with a view to the improvement of the navigation of the harbour or the increase of the accommodation available for vessels frequenting the same. By s. 25, there were substituted for the rates and duties on goods given by the Act of 1862, the shore dues on goods imported into or exported from the harbour set out in Schedule A, which are very much the same as those contained

in the Act of 1862, except that Schedule A contains this new clause: "Additional dues to be payable on completion of wet dock.—Goods (except coal, iron, or lime), loaded or discharged in the dock or exported or imported in vessels of a registered tonnage of 100 tons or upwards to be charged 75 per cent. above the rates specified." Sect. 25, also substituted for the rates and duties of tonnage given by the Act of 1862, the "tonnage dues on ships on entering or leaving the harbour" contained in Schedule B. In that schedule there are two sets of rates, one for vessels under, the other for vessels of or above 100 tons. The rates for vessels under 100 tons are practically the same as those imposed by the Act of 1862. Those for vessels of or above 100 tons are 2*d.* a ton higher than the other rates, but still lower than the rates imposed by the Act of 1808. Schedule B. also contains the following new clause: "Additional dues to be payable on completion of wet dock.—For every ship or vessel entering the wet dock over and above the before-mentioned dues for every ton 2*d.*"

Under these circumstances it was contended that the tonnage dues and harbour duty on all vessels entering the harbour should be taken into account in estimating the rateable value of the dock, because the increase in these dues (which, however, only existed in the case of vessels of or above 100 tons) must be attributed to the expense incurred by the commissioners in making the wet dock. To this, however, it seems to be a sufficient answer that the commissioners were by the Act of 1872, empowered to execute other works in addition to the wet docks, and that these dues were authorized to be taken immediately on the passing of the Act, and before the wet docks were completed or even begun, and might, it would seem, be taken although the wet docks never were made at all. I am therefore of opinion that these rates and duty are unconnected with the wet docks and cannot be said to have been earned by them.

Secondly, it was urged that assuming the tonnage dues on all ships could not be taken into account, yet that at least the whole of the tonnage dues and the duty paid by ships actually entering the wet dock should be brought into the account and not merely the additional 2*d.* per ton. The word "additional" it was said shewed that the totality of the dues in the case of a vessel

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entering the wet dock must be treated as a single and indivisible payment, and the whole of it must be deemed to be earned by the wet dock. For this position the case of *Reg.* v. *Hull Dock Co.* (1) was cited. In that case certain dues were given to the dock company in respect of the charges and expenses they had been at in making the docks, and these dues were of the same amount and were equally payable whether the ships entered the docks the property of the company, or merely entered the harbour, which was not the property of the company, without going into the docks at all. The docks were the sole meritorious cause of the company's right to the dues, and it was held that the dues were not the less earned by the docks where the ship actually entered the docks, because the ship must have paid the same amount if it had not entered the docks at all. In the present case the wet dock is not the sole meritorious cause of the commissioners' right to the dues. On the contrary, the commissioners have executed and maintain works in the harbour by which ships using the harbour are directly benefited, and seeing that all ships entering the harbour pay a certain and uniform rate whether they enter the wet dock or not, while those which enter the wet dock pay an additional rate of 2*d.* a ton from which those who do not enter it are free, and seeing that the former rate was always payable even before the wet dock was made, while the additional rate only came into operation when the wet dock was completed, the inference is, in my judgment, irresistible that the additional 2*d.* a ton alone is earned by the wet dock, and that the dues which all vessels pay alike, whether they enter the wet dock or not, are earned by the works carried out and maintained by the commissioners in the harbour, and cannot be taken into account in rating the docks, because they are not earned by the wet dock, nor is the wet dock in any way the meritorious cause of them. In my judgment the decision of the recorder was correct and must be affirmed.

WILLS, J. I am of opinion that the recorder was right in excluding from the receipts to be taken into consideration in assessing the commissioners in respect of the docks those portions

(1) 7 Q. B. 2.

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of the tonnage dues under Sched. B. of the Act of 1872, which are not the "additional dues" at the end of that schedule, and also the harbour duties of 3*s.* 4*d.* per vessel.

Since the year 1808, harbour duties have been charged under Acts of the years 1808, 1862, and 1872, respectively, upon ships making use of the harbour; but as the soil of the harbour did not belong to the commissioners, and any accommodation afforded by them through the pier, quays, and wharves which they owned was paid for by the import and export duties (which in the Act of 1872 are called the shore duties); the harbour duties were never treated as increasing the value of the occupation of the premises belonging to the commissioners, and therefore were not carried into the rating. This seems to have been a correct practice, according to the second branch of the decision in *Reg.* v. *Hull Dock Co.* (1)

In 1872 the Act under which dues are now collected was passed. It recited that the commissioners were desirous of undertaking the construction of a wet dock and other works for the improvement of the harbour and the accommodation of vessels resorting thereto, and for facilitating communication with the southern shore of the harbour, on being authorized to do so, and on the maximum rates and duties leviable by them being increased. The Act accordingly empowered them (s. 4) to make a wet dock; to make an embankment below high water-mark from Berwick Bridge to the landward end of Carr Rock Pier, and certain quays and wharves; and empowered them to take under Sched. A.—1, shore duties which (with a few very trivial alterations, and with the introduction of a very few articles not included in the former schedule) were identical with the then existing shore duties; 2, additional dues to be payable on the completion of the wet dock, and which were payable on goods loaded or discharged in the dock, or on goods exported or imported in vessels of a registered tonnage of 100 tons or upwards. And under Sched. B. 1, tonnage duties on vessels entering or leaving the harbour, and not using the wet dock, which for small vessels were the same as the then existing tonnage duties, but which for vessels of or above 100 tons register were materially higher than those

(1) 7 Q. B. 2.

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leviable under the Act of 1862; a harbour duty of 3*s.* 4*d.* per vessel, which was the old duty, except that an additional sum was now made chargeable upon vessels remaining in the harbour more than six weeks; 3, certain dues in certain events upon boats, which were the same as the existing dues; 4, additional tonnage dues at the rate of 2*d.* per ton, to be payable on completion of the wet dock, in respect of every vessel entering the wet dock.

There were thus two classes of tonnage dues—1, upon vessels which did not enter the docks, which were substantially and with two very trivial exceptions the same as the old harbour duties; 2, upon vessels which did enter the docks, the latter being 2*d.* per ton higher than the former. By the preamble of the Act the rate upon a vessel which entered the docks, and which was the aggregate of the harbour duty proper, and the 2*d.* per ton payable on entering the wet dock, is treated as one rate, and the additional dues are spoken of as effecting an increase of the maximum rates theretofore chargeable, which were harbour duties simply, and not as a new and separate charge. If this form of expression were to be taken as conclusive, it would follow that the whole of the larger rate chargeable upon a vessel entering the dock must be treated as one and indivisible; and it would follow, further, that either the whole of it must be included, or in calculating the earnings of the dock, the whole of it must be rejected as an element in arriving at their rateable value. But I think this would be a pedantic adherence to mere phraseology, and would ignore the facts and the real substance of the enactment. The commissioners do works of two classes: they construct an embankment ending with the landward end of Carr Rock Pier and certain quays, and also a wet dock. By the first of these they improve the facilities for landing goods, and as a compensation they get, in the case of vessels of or above 100 tons, largely increased landing charges in case such vessels use the quays or the Carr Rock Pier without entering the dock. As to these, no question arises. As a compensation for constructing the wet docks, they get, besides the increased shore duties on all goods in respect of which the docks are used, the additional tonnage duty of 2*d.* per ton on vessels which enter the dock. The substance of this enactment seems to be that the commissioners get the old

tonnage dues which were chargeable before the dock was constructed, and which still attach the moment the vessel crosses the outer boundary of the harbour, some two miles, as we are told, from the dock gates, and which are therefore irrespective of the use of the dock; and beyond that, get a fresh tonnage charge upon every vessel which uses the dock. The result is to shew that the charge which in the preamble is called one is in effect two—namely, the old tonnage dues, which were strictly harbour dues, and which have never been taken into account in rating the commissioners, and the dues for the use of the dock. I see no reason why the portion of the aggregate duty referable to the mere use of the harbour, and which the provisions of the Act make it easy to separate from the total, should assume a different character because the dock (which may or may not be used, and which is of no benefit to the ship making no use of it) is allowed to earn an additional 2*d.* per ton, if used.

The duty of 3*s.* 4*d.* on each ship entering the harbour is wholly unaffected by the construction of the dock, and is not increased in the case of a vessel entering the dock, and I think it retains its old character and has been properly excluded from calculation by the recorder.

It is said, however, that such a decision conflicts with the case of *Reg.* v. *Hull Docks Co.* (1) cited above. I do not think so. In that case the charge was upon every vessel entering the harbour, basin, or docks; and it was the same in each of the three cases. The Court held that when once a vessel did enter the docks the rate was earned by the docks, and was, therefore, to be taken into account in assessing their earnings. It is difficult to see how any other conclusion could be arrived at. It was not possible to dissect the charge and say that a portion was paid as a mere harbour due, inasmuch as the only definite measure of the harbour due afforded by the Act, if subtracted from the total charge, would have left nothing as the earning of the docks.

I think, therefore, that as to the dock the learned recorder was right as to both the classes of dues which he excluded.

As to the Carr Rock, it seems to me that the facilities which were afforded by the property of the commissioners were paid for

(1) 7 Q. B. 2.

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by the shore dues. It is not contended that the soil of the bed of the harbour adjoining the Carr Rock, where vessels lie alongside it, belongs to the commissioners. It is said, however, that it earns the tonnage dues which are of the character of harbour dues by having a mooring port to which vessels make fast. I cannot think that this is anything more than a facility for the landing of goods, paid for by the shore duties. It would be going a long way to say that it was enough to turn the harbour dues which would be payable by a vessel, whether it made fast to the mooring port or depended upon its own anchor, into earnings of the pier or landing place, and I think that in respect of the Carr Rock also the decision of the learned recorder was right.

The order of sessions will therefore be confirmed with costs.

Order confirmed.

Solicitor for the appellants: *Cronin, for Sanderson & Weatherhead, Berwick-upon-Tweed.*

Solicitor for the respondents: *E. Bromley, for Willoby & Peters, Berwick-upon-Tweed.*

A. P. S.

IN RE HAWKE. EX PARTE SCOTT & SMITH. 1885 Dec. 9.

Bankruptcy—County Court—Jurisdiction—Fraudulent Preference—"Claim arising out of the bankruptcy"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 102.

The bankrupt carried on business as a corn merchant at Southampton, where his stores were under the charge of a manager. On the 8th of June the appellants, to whom the bankrupt was largely indebted for wheat then in his stores, were informed that the bankrupt was in difficulties, and thereupon arranged with the manager to repurchase the wheat on credit at a price exceeding 200*l.* The wheat was accordingly delivered to them on the following day. This sale was unknown to the bankrupt, who on the 8th of June sent out by post notices of suspension, which were delivered to the manager at Southampton and to the appellants on the following morning:—

Held (by Cave and Day, JJ.), that under s. 102 of the Bankruptcy Act, 1883, it was competent for the county court acting in bankruptcy to adjudicate upon a claim by the bankrupt's trustee for the return of the wheat by the appellants or payment of its value, for it must be taken to be "a claim arising out of the bankruptcy."

APPEAL from a decision of the judge of the County Court of Wiltshire, sitting at Salisbury, ordering the appellants to pay to the bankrupt's trustee 409*l.* 10*s.*, the value of wheat which they claimed to have purchased from the bankrupt on the 8th of June, 1885, the day when he suspended payment.

For some time previously to June, 1885, the bankrupt, a corn merchant, carried on business at Salisbury, where he lived, and at Southampton, where he possessed stores, and where the business was under the charge of a manager, Stapleton. In April he purchased from Messrs. Scott and Smith, of Warminster (the appellants), a quantity of wheat at a price of 38*s.* 6*d.* a quarter free on rail at Bristol, on usual Bristol terms, i.e. payment by bill at two months. The wheat was sent to the bankrupt's stores at Southampton, and 227 quarters of it remained there till the 9th of June. On the 8th of June the bankrupt owed the appellants 685*l.*, and on that day Stapleton telegraphed to the appellant Smith that he wished to see him. Smith in consequence went to Southampton, where he arrived between seven and eight o'clock in the evening, and he then learnt from Stapleton that the bankrupt was in difficulties, and it was arranged that the appellants

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should buy the 227 quarters of wheat in the bankrupt's stores at Southampton at 36*s.* per quarter on the usual Bristol terms, and bought and sold notes were made out accordingly, dated the 8th of June, and signed by Stapleton as agent for the bankrupt. On the same day the bankrupt had sent out by post notices that he was compelled to suspend payment. These notices were not delivered till the morning of the 9th of June; that directed to Stapleton reached him at 7 A.M. on the 9th. On the morning of the 9th the wheat, by Smith's orders, began to be removed from the bankrupt's stores, the whole being carried away during the day. As soon as the bankrupt became aware of the transaction he wrote to the appellants repudiating it, and pointing out that, as he had suspended payment, it was unfair to his other creditors. The trustee in bankruptcy applied to the county court judge for an order that the alleged purchase of wheat was void as against him, the trustee, and for an order for a return of the same or its value. The learned judge, after hearing evidence, made the order on the ground that the purchase was a fraud on the bankruptcy laws.

Herbert Reed, (*Rubie*, with him), for the appellants. The county court had no jurisdiction to hear this claim, as it does not arise out of the bankruptcy, and therefore it is within the proviso of the 1st clause of s. 102 (1) of the Bankruptcy Act, 1883, which limits the jurisdiction given by the first part of the clause. It will be said this objection was not taken in the first instance before the county court, but it was referred to by counsel in opening the case, and it could not be taken until the judge had decided whether there

(1) Sect. 102 (1): "Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case:

"Provided that the jurisdiction hereby given shall not be exercised by the county court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not, in the opinion of the judge exceed in value two hundred pounds."

was a fraudulent preference or not, because if he rightly decided that there was a fraudulent preference, then he had jurisdiction, but it is submitted that his decision was wrong, and that there was no fraudulent preference, or what he has called a fraud on the bankruptcy laws; and that the objection was taken during the hearing of the case; and that it is immaterial when it is taken, provided it be at any time during the hearing. Either this was a sale, in which case the trustee has no claim; or it was not a sale, and then the trustee's claim is just the same as that of the bankrupt, and does not depend on or arise out of the bankruptcy.

Cooper Willis, Q.C. (*F. Cooper Willis*, with him), for the trustee, was only called upon on the question of jurisdiction. It is too late to take objection to the jurisdiction after the case has been heard on the merits: *Ex parte Swinbanks, In re Shanks.* (1) This claim would never have arisen but for the bankruptcy.

CAVE, J. I am of opinion that in this case the county court had jurisdiction. The first clause of s. 102 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), is undoubtedly large enough to include this case; the only question is whether the jurisdiction thus conferred is cut down by the second part of the clause, which is in these terms: "Provided that the jurisdiction hereby given shall not be exercised by the county court for the purpose of adjudicating upon any claim not arising out of the bankruptcy which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not, in the opinion of the judge, exceed in value two hundred pounds." The parties did not consent, and the money in dispute exceeds in value 200*l.*, therefore the question is, is this a claim which arises out of the bankruptcy? Now one cannot help seeing that but for the bankruptcy this transaction would never have taken place. The circumstances are, that Smith and Stapleton, the agent of Hawke, the bankrupt, enter into a transaction not in the ordinary course of business, and when Hawke hears of it he repudiates the transaction, but he does not treat it as a wrong done to himself, but to

(1) 11 Ch. D. 525.

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IN RE HAWKE. EX PARTE SCOTT.

his creditors; he says in effect, you ought not to have done this, because you knew I had suspended payment, and the matter must be investigated by the official receiver. It seems to me that but for the impending bankruptcy the transaction would never have taken place, and but for the actual bankruptcy it would never have been impeached. The distinction, as I understand it, is this; suppose that before bankruptcy there had been a dispute between the bankrupt and A., then such a claim does not arise out of the bankruptcy, and the trustee has only the same claim as the bankrupt had; but I cannot conceive that this claim would have arisen but for the bankruptcy, and therefore I think it is a claim arising out of the bankruptcy. There is a great advantage in this construction, because the question whether a transaction is a fraudulent preference, or, as it is called here, a fraud on the bankruptcy laws, cannot be answered till the matter has been wholly investigated. Here, if Hawke had known of it, it was a fraudulent preference, and the Court would have had jurisdiction, but if not, then, on the appellants' construction, the Court would have no jurisdiction, and it must hold its hand and the matter must be investigated de novo in the Common Law Courts at fresh expense to Hawke, and although the Bankruptcy Court had all the materials before it for a decision. That shews how reasonable it is that the Court should have jurisdiction in this case. I have not the slightest doubt as to the right of the county court to make the order. As to the facts, the conclusion of the county court judge was just and proper and his judgment must be affirmed.

DAY, J. I concur.

Appeal dismissed.

Solicitors for appellants: *Crowder & Vizard, for Chapman & Ponting, Warminster.*

Solicitors for trustee, the respondent: *Hacon & Turner, for Lee & Powning, Salisbury.*

A. P. S.

[IN THE COURT OF APPEAL.]

1886
Jan. 27.

MARTIN *v.* TREACHER.

Practice—Discovery—Interrogatories—Penalties, Action for, by Common Informer—Order XXXI., r. 1.

The general rule is that in an action for penalties by a common informer leave will not be given to the plaintiff to administer interrogatories.

APPEAL from the order of the Queen's Bench Division affirming the order of a judge at chambers, whereby he rescinded the order of the master giving leave to the plaintiff to administer interrogatories to the defendant.

The action was by a common informer, who sued the defendant for penalties under the Public Health Act, 1875, for acting as member of a local board without being duly qualified. The general scope of the proposed interrogatories was to establish the fact that the defendant was not duly qualified.

Lumley Smith, Q.C., and *McIntyre*, for the plaintiff. It is submitted that there is no reason why a plaintiff in an action for penalties should not be entitled to interrogate.

The terms of Order XXXI., r. 1, upon which the right to interrogate now depends, are perfectly general, and are applicable to such a plaintiff as well as others. The rule provides that in actions for fraud or breach of trust the parties may without order and "in *every* other cause or matter the plaintiff or defendant may by leave of the Court or a judge deliver interrogatories." The general rule with regard to interrogatories the answers to which may tend to criminate, or expose the party answering to a forfeiture, is that there is no objection to their being put, but the party interrogated may take the objection in his answer on oath and may decline to answer: *Bickford* v. *D'Arcy* (1); *Fisher* v. *Owen* (2); *Webb* v. *East* (3); *Eade* v. *Jacobs* (4). That had in some cases been held to be the rule even before the Judicature Acts: *MacFadzen* v. *Mayor of Liverpool* (5); and it is submitted that it applies in an action for penalties as in other cases.

(1) Law Rep. 1 Ex. 354.
(2) 8 Ch. D. 645.
(3) 5 Ex. D. 23.
(4) 3 Ex. D. 335.
(5) Law Rep. 3 Ex. 279.

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[LINDLEY, L.J. Would not a bill for discovery in equity in aid of an action for penalties have been demurrable?]

That argument goes too far, because a bill for discovery would not lie in aid of many actions of tort in which there clearly would be a right to interrogate. *Hunnings* v. *Williamson* (1) was wrongly decided. The judgment was based upon the supposed existence of a general rule in equity that there could be no discovery in aid of an action for penalties. The authorities there cited do not, it is submitted, bear out that proposition. *Chadwick* v. *Chadwick* (2), which was relied upon, does not really decide any such thing. The objection there taken was that the defendant in answering was not bound to criminate himself, and there is nothing in the actual decision to shew that such interrogatories as these cannot be put. The same observation applies to *Paxton* v. *Douglas* (3), and *Green* v. *Weaver* (4), for in both those cases the question discussed was whether the party could be compelled to answer.

The portion of the judgment in *Chadwick* v. *Chadwick* (2), which is supposed to establish the proposition that there cannot be discovery in the case of an action for penalties, was merely obiter by way of suggested explanation of the dicta of Lord Eldon in *Paxton* v. *Douglas*. (3)

In *Kennedy* v. *Lyell* (5) a defendant was allowed to interrogate a plaintiff in an action for penalties. It would be a very one-sided state of things if the defendant could interrogate while the plaintiff could not.

[They also cited *Atherley* v. *Harvey* (6); *Allhusen* v. *Labouchere* (7); *Harvey* v. *Lovekin*. (8)]

Whitehorne, Q.C., and *Randolph*, for the defendant. It was not intended by the new rule (Order XXXI., r. 1), to alter the previously existing law with regard to the question whether interrogatories and discovery are allowable. The rule is only intended to deal with the mode of procedure. It was the well-established rule, both in courts of law and equity, before the

(1) 10 Q. B. D. 459.
(2) 22 L. J. (Ch.) 329.
(3) 19 Ves. 225.
(4) 1 Sim. 404, 430.
(5) 23 Ch. D. 387; 9 App. Cas. 81.
(6) 2 Q. B. D. 524.
(7) 3 Q. B. D. 654.
(8) 10 P. D. 122.

Judicature Acts, that discovery and interrogatories would not be allowed when the object of the action was to enforce a penalty. *Pye* v. *Butterfield* (1), *Edmunds* v. *Greenwood* (2), and *Tupling* v. *Ward* (3) are cases where interrogatories were disallowed at common law in accordance with the principle that a party could not be interrogated where the answer might entail a penalty or forfeiture or other penal consequences. That such was the rule in equity is clearly shewn by a series of authorities: *United States of America* v. *McRae* (4); *Southall* v. ——— (5); *Sloman* v. *Kelly* (6); *Orme* v. *Crockford* (7); *Lichfield* v. *Bond* (8); *Smith* v. *Read* (9); *Boteler* v. *Allington.* (10)

Lush, J., sitting at chambers, ordered interrogatories which had been delivered in an action for penalties to be struck out, on the ground that discovery was never given in an action by a common informer: *Anonymous Case.* (11)

Lumley Smith, Q.C., in reply, cited *Society of Apothecaries* v. *Nottingham.* (12)

LORD ESHER, M.R. In this case leave to administer interrogatories under Order XXXI., r. 1, was refused by the judge in chambers and by the Divisional Court, not in the exercise of a discretion with regard to the particular circumstances of the case, but in pursuance of a supposed general rule to the effect that in such a case as this interrogatories are not admissible. We have, therefore, to consider whether the rule so laid down is correct. The action is brought by a common informer for penalties. The obvious and direct purpose of the proposed interrogatories is to obtain from the defendant admissions which would shew that he had subjected himself to the penalties for which the action is brought. The question is, whether it is correct to say that in such a case, at all events as a general rule, the Court will not allow the plaintiff to administer interrogatories. Various arguments have been put forward. It was suggested

(1) 5 B. & S. 829.
(2) Law Rep. 4 C. P. 70.
(3) 6 H. & N. 749.
(4) Law Rep. 3 Ch. 79.
(5) Y. 317.
(6) 4 Y. & C. 169, 172.
(7) 13 Price, 376.
(8) 12 L. J. (N.S.) Ch. 329.
(9) 1 Atk. 526.
(10) 3 Atk. 457.
(11) W. N. 1875, p. 219.
(12) W. N. 1875, p. 259.

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that the Court ought not to allow interrogatories under the rule in a case in which neither a Court of Law nor a Court of Equity has ever allowed them before the Judicature Acts. Without going the full length of this proposition, which does not seem to me to be necessary for the purposes of this case, and without saying that there may not be very exceptional cases, which I cannot at present particularize, where the Court may allow interrogatories, though neither Courts of Law nor Courts of Equity have heretofore allowed them, I think it may fairly be said that the fact that in any given class of cases interrogatories have never heretofore been allowed either in a court of law or a court of equity is very strong to shew that there must be good reasons why they should not be allowed in such cases under this rule. It has in many cases been suggested that where the answer to an interrogatory, if answered in one way, would lay the person interrogated open to a criminal charge, or to an action for penalties, in such case the interrogatory ought not to be allowed. But it is clear that this suggestion goes too far. The decisions shew that the mere fact that the answer might lay the person interrogated open to a criminal charge or to an action for penalties is not in itself, in most cases, a sufficient reason why the interrogatory should be disallowed; and that as a general rule the party interrogated must take the objection upon oath in his answer. Where the action is not to recover a penalty but for some other object, it cannot as a general rule be laid down that the mere fact that the answer to the interrogatory, if answered in one way, might subject the person interrogated to a penalty would of itself make the interrogatory inadmissible. But the question here is whether, when the action is brought for a penalty and the Court is asked for leave to administer interrogatories, in order to obtain answers which will assist the plaintiff in proving that the penalty has been incurred, the Court ought to give such leave. In reference to that question it is to be observed that no case has been cited in which, under similar circumstances, a Court of Law has allowed such interrogatories, or a Court of Equity has aided a common informer to obtain discovery.

There must obviously be some reason why such interrogatories were never allowed, and the reason I think may be gathered

from what was said by the Court in the case of *Orme* v. *Crockford*. (1) That was the case of a demurrer to a bill filed for discovery of sums of money won at play in aid of an action by a common informer to recover treble the value of the amounts so won under 9 Ann, c. 14. Alexander, C.B., a judge who had more knowledge of equity than common law judges usually had at that time, states the grounds for refusing discovery in such a case in the following terms:—"Then we must not lose sight of the fact that it is a most important right of which this bill seeks to deprive the defendant, no less than that of protecting himself by refusing to answer from the consequences of answering questions which might tend to charge him with a crime or subject him to penalties or forfeiture of estate, contrary to the humane policy of the law." These words, I think, require some explanation, or else they might seem large enough to cover cases where the action was not brought for penalties, and to shew that in the case of any action the interrogatories could not be put when the answer might tend to criminate or expose the person interrogated to penalties; and I think this explanation is supplied by what is said by Garrow, B., in the same case at p. 391. He says there, "he (the informer) charges that the defendant has won various sums at play. He then calls on him to acknowledge the truth of such charges, not in aid of an action to recover the money lost," which seems to shew that such an action would have stood in this respect on a different footing, "but penalties amounting to treble the sums lost. It would be a monstrous thing if we were obliged to give an informer the advantage of such a discovery in aid of an action for such penalties, partly for the benefit of himself, and partly to be given to the parish." The Court, therefore, in that case declared that it would not aid an action by a common informer for penalties. The reasons given seem substantially to amount to this: although the penalty is not in strict law a criminal penalty, yet the action is in the nature of a criminal charge against the defendant: it is obvious in such a case that the action is of a fishing character, the plaintiff first bringing his action and then seeking to obtain the necessary materials to support it by interrogating the defendant: and, the object of the action being to subject the defendant to a penalty in the nature of a criminal

(1) 13 Price, 376

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penalty, it would be monstrous that the plaintiff should be allowed to bring such an action on speculation, and then, admitting that he had not evidence to support it, to ask the defendant to supply such evidence out of his own mouth and so to criminate himself. It is on this principle, as it seems to me, that a court of equity would not grant its aid to such an action. This principle seems to have been followed by Lush, J., in the *Anonymous Case* cited from the *Weekly Notes*, and it appears to me to be a good and just principle. Many cases have been cited to shew that there is no rule against administering interrogatories the answer to which may tend to criminate, but not one of those cases tends to shew that in the case now before us it would be just or proper to allow them. I should say, therefore, that, as a general rule, and in the absence at any rate of any very exceptional circumstances, such as I cannot at the present moment suggest to myself, which might afford ground for an exception to the rule, a common informer cannot be permitted to administer interrogatories in an action for penalties in order to enable himself to maintain such action. It was suggested by the plaintiff's counsel that the defendant in such an action could interrogate the plaintiff, and that there ought not to be an inequality between them in this respect. I see no objection to the conclusion at which we have arrived on that ground, or that justice to the plaintiff requires it to be otherwise. The action for penalties is a severe action, and has always been treated as a penal action. For these reasons I am of opinion that the decision of the Queen's Bench Division was correct, and should be affirmed.

LINDLEY, L.J. I am of the same opinion: and I must say that the case appears to me a very plain one. The sole object of the action is to recover penalties. The plaintiff is not attempting to enforce thereby any civil rights apart from such penalties. As the practice now stands, the parties to an action are not entitled to administer interrogatories as a matter of course, but must obtain leave to do so. Accordingly the plaintiff here has applied for leave to administer interrogatories to the defendant under Order XXXI., r. 1; and we have to consider on what principles we ought to deal with that application. It seems to

me that we ought to be guided in dealing with it by the well established principles of law with regard to discovery. It is a well established principle that the defendant is, at any rate, not bound to answer an interrogatory if the effect would be to expose him to a penalty, so that the question is reduced to the narrow but still important question whether these interrogatories should be stopped in limine or should be administered leaving the defendant to object to answer them. I cannot see in the present case what advantage can be gained by the latter course. I can well understand that in many cases it may not be expedient to stop the interrogatories in limine when the action is to establish some civil right apart from the mere penalty, but it seems to me to be otherwise when the action is a mere action for penalties by a common informer. Looking to the practice with regard to this matter, we find no precedent for allowing such interrogatories at common law except the decision at Chambers in *Society of Apothecaries* v. *Nottingham* (1), while there are authorities the other way. And looking to the equity side we find no instance where discovery has been granted in such a case, but, on the contrary, many instances where it has been refused, as, for example, in the case of *Orme* v. *Crockford* (2), where the question arose on demurrer to a bill for discovery. I admit that it does not necessarily follow, because a bill for discovery would be demurrable, that there could not be discovery in a common law action, because there were undoubtedly many actions in the case of which equity would not interfere at all. But the Courts of Equity in refusing discovery in such cases as *Orme* v. *Crockford* (2) did not proceed on the ground that the action was one of that sort, but on the ground that the party against whom discovery was sought was not bound to criminate himself or to expose himself to penalties; and it is clear from the cases that this principle extends to statutory penalties such as those now sued for. It therefore seems to me, whether the case is looked at on principle or by the light of the practice heretofore followed, that the decision of the Court below was right; and that where the action is, as in the present case, a mere action for penalties, the interrogatories should not be allowed. In other cases, as it seems to me, the Court may

(1) W. N. 1875, p. 259.

(2) 13 Price, 376.

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under the rule allow such interrogatories to be administered leaving the party interrogated to decline to answer them, or may disallow the interrogatories according to circumstances. In general, no doubt, the proper course may be to allow the interrogatories, but still I think they might be disallowed under some circumstances.

LOPES, J. I agree. This is an action the sole object of which is to recover penalties. The plaintiff seeks to deliver interrogatories to the defendant. The judge at chambers and the Divisional Court have decided that he is not entitled to do so. We are now asked to allow him to do so, but, in my opinion, the decision of the Court below is right, and the interrogatories ought not to be allowed. It is clear that before the Judicature Acts equity would not have given discovery to a plaintiff in such an action, and that the case did not come within those principles upon which previously to those Acts discovery was granted at law or in equity. That being so, is there anything in those Acts to entitle the plaintiff to discovery? I think not. No doubt discovery is now allowed in cases where it would formerly have been refused, and the mere fact that the answer would criminate is not sufficient to preventt he interrogatory being put. But since the Judicature Acts, as before, discovery in an action like this has never been allowed. It was refused in the case of *Hunnings* v. *Williamson* (1), and also in the *Anonymous Case*, before Lush, J., at chambers, which was cited to us. I believe the true principle is that, when an action is brought the sole object of which is to enforce penalties, interrogatories cannot be administered, because the action is in the nature of a criminal proceeding, and in such a proceeding it would be monstrous and contrary to the policy of the law to compel the defendant before the trial to make admissions which would criminate himself and practically decide the action against him.

Appeal dismissed.

Solicitors for plaintiff: *Chamberlayne & Beaumont, for Hyde.*
Solicitor for defendant: *Joel Emmanuel, for Bell & Taylor.*

(1) 10 Q. B. D. 459.

E. L.

IN RE HUTCHINSON.
EX PARTE HUTCHINSON.

1885
Dec. 21.

Bankruptcy—Charging Order Nisi under 1 & 2 *Vict. c.* 110, *s.* 14—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45.

An order nisi charging shares under 1 & 2 Vict. c. 110, s. 14, is not "an execution against the goods of a debtor" within s. 45 of 46 & 47 Vict. c. 52 (the Bankruptcy Act, 1883).

APPEAL from an order of the Northumberland County Court that the appellants be restrained from taking any further proceedings to make absolute against the bankrupt an interim order charging shares obtained by them on the 31st of July, 1885.

The appellants, judgment creditors of the debtor, had obtained an order nisi under 1 & 2 Vict. c. 110, attaching certain shares standing in his name. On the 11th of August the debtor presented a petition in bankruptcy, and a receiving order was made, and also the order appealed against.

A. G. McIntyre, for the appellants. The injunction was wrong. The appellants are secured creditors. The charging order when made absolute will operate from the making of the order nisi: *Haly* v. *Barry*. (1)

Before 1883 an order nisi, whether charging shares or attaching debts, rendered the holder of it a secured creditor. A judgment creditor, who, before the filing of a liquidation petition by his debtor, had obtained a garnishee order nisi attaching debts due to the debtor, was a secured creditor within ss. 12 and 16 of the Bankruptcy Act, 1869, and therefore entitled to the attached debts as against the trustee in the liquidation, even though they did not become actually payable until after the commencement of the liquidation: *Ex parte Joselyne, In re Watt*. (2) The effect of that and other decisions was taken away as regards attachment of debts by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45.

(1) Law Rep. 3 Ch. 452.
(2) 8 Ch. D. 327.

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IN RE HUTCHINSON. EX PARTE HUTCHINSON.

That section deals expressly with execution against goods, and lands, and attachment of debts, and deprives the creditor of the benefit of the execution or attachment unless completed before the date of the receiving order. But the law as to a charging order on shares is left unaltered. The terms of sub-s. 2, viz., "For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver," are inapplicable to a charging order on shares. Such an order under 1 & 2 Vict. c. 110, s. 14, brings the holder exactly within the definition of "secured creditor" in s. 168 of the Bankruptcy Act, 1883.

Sidney Woolf, for the official receiver. It would be strange if the Bankruptcy Act, 1883, s. 45, altering the former law, should apply to every other kind of execution except a charging order. There can be no ground for any such exception. A charging order is within both the meaning and terms of the enactment. Obtaining a charging order is an execution, as the observations of Lord Hatherley in *Haly* v. *Barry* (1) seem to shew, and in *Finney* v. *Hinde* (2) Cockburn, C.J., said that 1 & 2 Vict. c. 110, was passed to facilitate "the execution of judgments," and Pollock, B., said it is "not a step in the action, but a new and substantive proceeding in the nature of an execution." (3)

Then, being an execution, the charging order is within s. 45. The intention of s. 45 evidently was to prevent any execution being available unless complete before the receiving order. Moreover the charging order is an execution against "goods" within s. 45. Shares are "goods:" *Colonial Bank* v. *Whinney*. (4) True, the order, if completed, dates back to when made nisi, but to do so a valid order absolute is necessary. Further, there must be more than an order absolute, there must be an action to enforce the charging order and judgment for sale of the shares: *Leggott* v. *Western*. (5) The order must be completed by proceedings analogous to seizure and sale. Sub-s. 2 illustrates the mode of

(1) Law Rep. 3 Ch. 452.
(2) 4 Q. B. D. 102, at p. 103.
(3) At p. 104.
(4) 33 W. R. 852.
(5) 12 Q. B. D. 287.

completing execution in the cases specified, but is not exhaustive of all the modes of completion. Delivery of goods under an elegit has been held to be a sale within s. 95, sub-s. 3, of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71): *Ex parte Vale, In re Bannister.* (1)

McIntyre, in reply. The argument for the official receiver would equally apply even if the charging order were made absolute, for it is contended that completion must be by judgment and sale. But the person obtaining the charging order is to be in the same position as if a deed charging the property had been executed by the judgment debtor: 1 & 2 Vict. c. 110, s. 14. Surely, if such a deed were executed, the person in whose favour it was made would be a secured creditor. The language of s. 45 of the Bankruptcy Act, 1883, is quite inapplicable to charging orders. "Execution" does not apply, and the words "seizure and sale" were in the Bankruptcy Act, 1869, and construed to have their technical signification: *Ex parte Abbott, In re Gourlay* (2); and not to apply to seizure of goods under an elegit.

The observations of Sir W. Page Wood, L.J., in *Haly* v. *Barry* (3) tend to shew that shares cannot be taken in execution, for the Lord Justice says the 1 & 2 Vict. c. 110, comes in to help the execution creditor "as to property not liable to be taken in execution." In *Leggott* v. *Western* (4) the application was for an order for sale of shares after a charging order absolute, and the Court held they had no power to order a sale, but that under 1 & 2 Vict. c. 110, s. 14, the judgment creditor was entitled to all such remedies as he would have been entitled to if the charge had been voluntarily made in his favour by the judgment debtor. Sect. 46 of the Bankruptcy Act, 1883, shews that the legislature, in s. 45, referred to seizure and sale by the sheriff.

[CAVE, J. Can the legislature have meant to take away the rights of the judgment creditor as to land, goods, and debts, and leave it as to shares?]

The distinction had previously been made, and the legislature had before the Act of 1883 restricted the right as to land, and

(1) 18 Ch. D. 137.
(2) 15 Ch. D. 447.
(3) Law Rep. 3 Ch. at p. 456.
(4) 12 Q. B. D. 287.

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left it as to shares. Read in its ordinary grammatical sense, as it should be, s. 45 does not include a charging order on shares.

Cur. adv. vult.

Dec. 21. The judgment of the Court (Huddleston, B., and Cave, J.) was delivered by

CAVE, J. The question in this case is whether an order made under the 1 & 2 Vict. c. 110, s. 14, is within the 45th section of the Bankruptcy Act.

The facts of the case are simple. On the 31st of last July the appellants, who were judgment creditors of the bankrupt, obtained an order nisi under the 1 & 2 Vict. c. 110, attaching certain shares standing in the name of the bankrupt. On the 11th of August the debtor presented a petition in bankruptcy, and a receiving order was made; and on the same day an order was made restraining the appellants from proceeding to make their order nisi absolute.

The 1 & 2 Vict. c. 110, which is entitled an Act for (amongst other things) extending the remedies of creditors against the property of debtors, provides by s. 14 that "if any person against whom any judgment shall be entered up shall have any government stock, funds, or annuities, or any stock or shares of or in any public company standing in his name in his own right, it shall be lawful for a judge, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order." By s. 15 the order is to be made in the first instance ex parte, and without any notice to the judgment debtor, and is to be an order to shew cause only. In *Haly* v. *Barry* (1) it was held that

(1) Law Rep. 3 Ch. 452.

the order, when made absolute, operates from the making of the order nisi.

By the 21 Jac. 1, c. 19, s. 9, it was enacted that all and every creditor and creditors having security for his or their several debts by judgment, statute, recognizance, specialty, or other security, of the goods and chattels of any such bankrupt whereof there was no execution or extent served and executed upon any the lands, tenements, hereditaments, goods, chattels, and other estate of such bankrupt before such time as he or she should or did become bankrupt, should not be relieved upon any such judgment, statute, recognizance, specialty, or other security, for any more than a rateable part of their just and due debts with the other creditors of the said bankrupt.

This Act was repealed by the 6 Geo. 4, c. 16, which by s. 81 enacted that all executions and attachments against the lands and tenements or goods and chattels of such bankrupt bonâ fide executed or levied more than two calendar months before the issuing of the commission should be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons at whose suit or on whose account such execution or attachment should have issued had not, at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed.

By the 2 & 3 Vict. c. 29, s. 1, it was enacted that all executions and attachments against the lands and tenements, or goods and chattels of any bankrupt, bonâ fide executed or levied before the date and issuing of the fiat, should be deemed to be valid notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person or persons at whose suit or on whose account such execution or attachment should have issued, had not at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed.

The last two Acts were repealed by the Bankruptcy Act of 1849, which by s. 133 enacted that all executions and attachments against the goods and chattels of any bankrupt, bonâ fide executed and levied by seizure and sale before the date of the

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Cave, J.

fiat or the filing of such petition, should be deemed to be valid notwithstanding any prior act of bankruptcy, provided the person at whose suit or on whose account such execution or attachment should have been issued, had not at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed. By s. 184, it was enacted that no creditor having security for his debt or having made an attachment in London or in any other place, by virtue of any custom there used of the goods and chattels of the bankrupt, should receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure and sale upon, or any mortgage of or lien upon any part of the property of such bankrupt before the date of the fiat or the filing of the petition for adjudication.

The Act of 1869, which repealed the Act of 1849, provided by s. 95, sub-s. 3, that notwithstanding any prior act of bankruptcy any execution or attachment against the goods of any bankrupt, executed in good faith by seizure and sale before the date of the order of adjudication should be valid, if the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale, notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication. Sect. 184 of the Act of 1849 was not re-enacted.

By s. 45 of the Act of 1883, it is enacted that where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition, by or against the debtor or of the commission of any available act of bankruptcy by the debtor. For the purposes of the Act an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure,

or in the case of an equitable interest by the appointment of a receiver.

It is clear that the 1 & 2 Vict. c. 110, gives the creditor who has obtained an order nisi a charge upon the shares of the debtor, and, although such charge was probably not a lien within the exception contained in s. 184 of the Bankruptcy Act, 1849, yet that section has not been re-enacted in the present Bankruptcy Act, s. 45 being only a reproduction with some alterations, which do not affect this case, of s. 133 of the Act of 1849, which again was a reproduction of s. 81 of the 6 Geo. 4, c. 16. In *Ex parte Joselyne, In re Watt* (1), it was held that a judgment creditor who before the filing of a liquidation petition by his debtor had obtained a garnishee order nisi attaching debts due to the debtor was a secured creditor within the Act of 1869, and it was never contended or suggested that such an order was an execution or attachment against the goods of the debtor within s. 95 of that Act, probably because, whatever might be the meaning to be attached to the word "goods" in that section, a garnishee order cannot be executed by seizure and sale. It is true that the language of s. 45 of the present Act differs from that of s. 95 of the Act of 1869, so that a garnishee order nisi is now specifically struck at by s. 45; but that is rather a reason why we should hold that an order under the 1 & 2 Vict. c. 110, is not within s. 45, seeing that there has been no alteration in the language of the successive Acts relating to executions and attachments of such a character as to apply to orders under the 1 & 2 Vict. c. 110, while s. 184 of the Act of 1849, which probably did apply to such orders, has not been re-enacted. In *Ex parte Abbott, In re Gourlay* (2), it was held that s. 87 of the Act of 1869 had no application to a seizure of goods under an elegit, because under an elegit there never was any sale by virtue of which any proceeds of sale could come into the sheriff's hands. In that case James, L.J., says: "If we were to extend the section to the present case, we should be not construing it, but legislating to supply an omission in it." So here, it may be that an order nisi under the 1 & 2 Vict. c. 110, s. 14, is a casus omissus; but if we were to treat the expression "an execution against the goods of a

(1) 8 Ch. D. 327. (2) 15 Ch. D. 447.

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debtor," which is to be completed by seizure and sale, as including such an order, we should, I think, be legislating to supply an omission and not construing the Act.

In my judgment the appeal should be allowed with costs.

Solicitors for appellants: *Freshfields & Williams.*

Solicitors for respondent: *Maples, Teesdale & Co.*

J. R.

1886

Jan. 22.

[IN THE COURT OF APPEAL.]

EX PARTE BARNE. IN RE BARNE.

Bankruptcy—Receiving Order—Jurisdiction—Domicil of Debtor—Residence—Onus of Proof—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 1 (*d*), *s.* 95.

The onus is on the petitioning creditor to prove that the debtor's domicil is English, as required by s. 6, sub-s. 1 (*d*) of the Bankruptcy Act, 1883, and that his residence has been such as to give the High Court jurisdiction under s. 95. But, if there is no reason to suppose that the debtor will dispute that his domicil is English, or that the petition is presented in the right court, the petitioning creditor need not in the first instance adduce evidence of either of those facts.

Ex parte Cunningham (13 Q. B. D. 418) explained.

APPEAL from a receiving order made by Mr. Registrar Giffard against William Charles Barne.

The petition for the order was presented in the Queen's Bench Division of the High Court by J. F. Hamilton, and it described Barne as "late of Gort House, Petersham, in the county of Surrey, and of the Junior United Service Club, Charles Street, St. James', in the county of Middlesex, retired officer in Her Majesty's army, and lately carrying on business as a flint glass manufacturer at William Street, Lambeth, in the county of Surrey, and at 97, Cannon Street, in the city of London, under the name, style, or firm of John McLachlan & Co."

Barne had formerly been an officer in the English army, but had retired.

The petition alleged that Barne "has, for the greater part of six months next preceding the presentation of this petition, carried on business under the style or firm of John McLachlan & Co. at William Street and Cannon Street aforesaid." The petition was filed on the 19th of October, 1885. Barne gave notice of his

intention to oppose the making of a receiving order, on (inter alia) the ground that "he has not for the greater part of six months next preceding the presentation of the petition carried on business as in the petition alleged." The notice did not in any way intimate that Barne was not domiciled in England.

Evidence was adduced upon the objections raised by the debtor's notice, and (inter alia) an affidavit was made by Barne in which he described himself as "of No. 74, Avenue de la Toison d'Or, Brussels, Belgium, a retired officer in Her Majesty's army." In this affidavit he said, "I left England and came to reside in Belgium solely for educational and business purposes, and I have been in daily communication with my solicitors, my family, and friends, ever since my absence from England." This affidavit was sworn before the English Consul at Brussels.

R. Melville, for the debtor. The onus is on the petitioning creditor to prove that the High Court has jurisdiction by reason of the debtor having an English domicil (1): *Ex parte Cunningham.* (2) In that case Baggallay, L.J., said (3): "I am of opinion that the onus is on the petitioning creditor to shew that the debtor is domiciled in England. I can quite conceive that there may be cases in which there is such an amount of primâ facie evidence of an English domicil as to shift the burden on to the respondent." And Cotton and Lindley, L.JJ., expressed themselves to the same effect. Here no evidence has been adduced to prove that the debtor was domiciled in England when the petition was presented. This objection was not raised by the debtor's notice, because the notice, which was given in accordance with

(1) Sect. 6 of the Bankruptcy Act, 1883, provides that "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—(inter alia) (*d.*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England."

Sect. 95 (1). "If the debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district as defined by this Act for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any county court, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court."

(2) 13 Q. B. D. 418.

(3) Page 421.

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Ex parte Barne. In re Barne.

rule 137 of the Bankruptcy Rules, 1883, was only a notice "specifying the statements in the petition" which the debtor intended to dispute. This objection to the jurisdiction arises, not on the petition, but on the Act.

The onus is equally on the petitioning creditor to shew that the petition was presented in the proper court according to the provisions of s. 95. It is not proved that the debtor has resided or carried on business within the London bankruptcy district for the necessary time to give the High Court jurisdiction under s. 95.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the petitioning creditor, were not heard.

Lord Esher, M.R. We are bound by the decision of this Court in *Ex parte Cunningham* (1), which, if I may say so, I think was a right decision. The burden of proving the jurisdiction of the Court, under both s. 6 and s. 95, lies on the petitioning creditor. What amount of evidence will be sufficient to make out a primâ facie case under either section it is not necessary now to determine. The language used by Baggallay, L.J., in *Ex parte Cunningham* (1) must, I think, be interpreted with reference to the particular facts of that case; it was there assumed by every one that the debtor's birth domicil was in Ireland. If the burden of proving that the debtor's domicil was English lay originally on the petitioning creditor, it certainly lay more heavily on him if the debtor's domicil of origin was in Ireland. The language of Baggallay, L.J., cannot be criticised as applied to that state of facts. The only question is, how much evidence the petitioning creditor is bound in the first instance to adduce in order to shift the burden of proof. It would be contrary to the practice of the Court and to the necessity of the case that the petitioning creditor should be bound to go to the Court with evidence to prove that the debtor is a born Englishman, if it has been assumed by both parties throughout the proceedings that he is. But, in the present case, I think the debtor has himself proved all that is necessary to found the jurisdiction of the Court. The only proper inference to be drawn from his affidavit is, that he was a born Englishman. He says that he went to Brussels, not

(1) 13 Q. B. D. 418.

because he was not an Englishman, but in order to educate his children, and he treats his family as being English people living in England. The affidavit is conclusive, to my mind, that he is an Englishman by birth, and he does not pretend that he has changed his domicil.

As to the other point, the affidavit describes him as of No. 74 in a certain street in Brussels. The meaning evidently is that that house is his residence. He has proved, therefore, that, at the time of the presentation of the petition he was an Englishman residing abroad. He himself has brought himself within the jurisdiction. The appeal must be dismissed.

LINDLEY, L.J. I also am of opinion that the debtor's affidavit disposes of all the difficulties in the case. It entirely removes all difficulty under s. 95, and I think it also removes the difficulty as to domicil. The language of s. 6 shews that the burden of proving the domicil of the debtor is on the petitioning creditor, if there is any dispute about it. No one expects that the petitioning creditor should go into court armed with evidence of the debtor's domicil, when there is no reason for supposing that his English domicil will be disputed. If it is disputed, the burden of proof is on the petitioning creditor. The only possible inference from the debtor's affidavit is, that he is an Englishman; he insinuates nothing to the contrary. He has an English name; he has been an officer in the English army; and he swore his affidavit before the English Consul in Brussels. After this it would be pedantic to say that any other evidence is required.

LOPES, L.J. No doubt the petitioning creditor must give primâ facie evidence to shew the jurisdiction of the Court. But the affidavit of the debtor appears to me to remove the objections which have been taken; any one who reads it must conclude that the debtor is an Englishman, and that he is resident out of England. If this be so, the objections under both s. 6 and s. 95 are removed.

Appeal dismissed.

Solicitors for debtor: *Jackson & Co.*

Solicitors for creditor: *Tamplin, Tayler, & Joseph.*

W. L. C.

1886
Feb. 10.

[IN THE COURT OF APPEAL.]

MYERS *v.* ELLIOTT.

Bill of Sale—Bills of Sale Act (1878), *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43)—*Form in Schedule, Deviation from—Lump Sum for Interest.*

A bill of sale, given to secure repayment of money, provided that the sum advanced, together with 15*l.* for agreed interest and bonus thereon, making in all 130*l.*, should be paid by monthly instalments of 10*l.* 16*s.* 8*d.*; that the grantee might seize the goods assigned if the grantor made default in payment of the sum thereby secured at the time therein provided for payment, or in the performance of any of the covenants therein contained and necessary for maintaining the security; and that, if the grantee seized the goods in consequence of a breach of any of the covenants therein contained, he might sell the same or any part thereof at the expiration of five clear days from the day of seizure:—

Held, that the bill of sale was void as substantially deviating from the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, first, because it would entitle the grantee to seize and sell the goods for the whole 130*l.* secured on failure in payment of any one monthly instalment; secondly, because, the bill of sale not stating how much of the 15*l.* was bonus and how much interest, it was impossible to tell from its terms what was to be paid for interest.

Semble, that, even if the whole 15*l.* were to be regarded as interest, the bill of sale was void because it did not shew the rate of interest to be paid as required by the statutory form.

Thorpe v. *Cregeen* (55 L. J. (Q. B.) 80) questioned.

Appeal from the judgment of Mathew, J., on an interpleader issue in favour of the plaintiff, who claimed certain goods, which had been taken in execution, under a bill of sale given by the execution debtor.

It was contended for the defendant, the execution creditor, that the bill of sale, which was executed in 1885, was bad, because it did not follow the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882. The bill of sale in consideration of the sum of 45*l.* already owing by the grantor to the grantee thereof, and of a further advance of 70*l.* from the grantee to the grantor, amounting in the aggregate to 115*l.*, conveyed the chattels specified in the schedule thereto to the grantee by way of security for payment in manner thereinafter appearing of the sum of 115*l.*, together with the sum of 15*l.*

for agreed amount of interest and bonus thereon, making together the sum of 130*l.* The grantor of the bill of sale therein covenanted to pay to the grantee the sum of 130*l.* aforesaid by twelve equal monthly instalments of 10*l.* 16*s.* 8*d.*, at specified dates. It was provided that the chattels assigned should not be liable to be seized or taken possession of by the grantee for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, that is to say, among others (1) if the grantor should make default in payment of the sum thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement therein contained and necessary for maintaining the security. It was also provided that, if the chattels assigned should be seized or taken possession of by the grantee in consequence of a breach of any of the covenants therein contained, the grantee should be at liberty to remove or sell the same, or any part thereof, at the expiration of five clear days from the day of seizure. The learned judge, on the authority of *Thorpe* v. *Cregeen* (1), held the bill of sale good.

Crump, Q.C., and *Herbert Reed*, for the defendant, the execution creditor. The bill of sale is void, because it deviates substantially from the form in the schedule. The case comes within the authority of *Davis* v. *Burton* (2), because under the provisions of the bill of sale on failure to pay one instalment the chattels assigned might be seized for the whole of the sum secured, viz. 130*l.* Secondly, the 130*l.* secured includes capitalized interest, which is contrary to the form in the schedule. Thirdly, the bill of sale is bad, because it does not specify the rate of interest as required by the form in the schedule. The intention was to prevent the concealment of an exorbitant rate of interest by providing for payment of a lump sum by way of bonus.

Lockwood, Q.C., and *Beddall*, for the plaintiff, the claimant. The true construction of the bill of sale is that upon default in payment of any instalment the grantee can only seize and sell the goods for the amount of the principal outstanding and the proportion of interest then due, which can be calculated, though

(1) 55 L. J. (Q.B.) 80. (2) 11 Q. B. D. 537.

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MYERS v. ELLIOTT.

no rate is specified. For instance, if the default is in payment of the first instalment, he can only seize for 115*l.* plus the interest for the month. In *Davis* v. *Burton* (1) there was an express provision that the grantee might seize for the whole amount, including the capitalized interest, on failure to pay one instalment. It is not necessary that the rate of interest should be expressly specified: it is enough if it can be calculated from the lump sum to be paid in addition to the principal. In *Davis* v. *Burton* (2), Fry, L.J., says, "a fixed sum by way of interest may be lawful." The form in the schedule says "at the rate of —— per cent. per annum [or whatever else may be the rate]," which looks as if it was not intended that there should be always a percentage rate.

[LORD ESHER, M.R. Bonus and interest are not properly the same thing. There is nothing to shew how much of the 15*l.* is interest, and how much bonus. How is it possible then to say even what the lump sum paid for interest is?

LOPES, L.J. According to the plaintiff's view the rate of interest must vary from month to month.]

A bill of sale which, so far as the question of interest is concerned, was in exactly the same form as this, was held good in *Thorpe* v. *Cregeen.* (3)

H. Reed, in reply.

LORD ESHER, M.R. Cases are now constantly coming before us in which a printed form of bill of sale has been used deviating more or less from that given by the schedule to the Act, and no one can doubt that the object in these cases of those using such forms is to evade the Act, and preserve as much as possible to the money lender those advantages which he formerly had as against the borrower, but which the statute intended that he should not possess. In many cases forms of this sort have been held bad, and we have now before us another case of the same description, in which we have to determine whether the form of bill of sale employed is bad in consequence of the deviation from the statutory form. The true construction of the provision in this bill

(1) 11 Q. B. D. 537. (2) 11 Q. B. D. 542.
(3) 55 L. J. (Q.B.) 80.

of sale with regard to seizure of the goods assigned seems to me to be that, on default in payment of one of the instalments, the grantee of the bill of sale becomes entitled to exercise his full rights as owner of the goods, and accordingly may sell the whole of them and receive the proceeds, accounting to the grantor only for any balance realized over and above the sum of 130*l.* secured by the bill of sale. If that is so, the decision in *Davis* v. *Burton* (1) clearly applies, and the bill of sale is void.

There is another objection to the bill of sale. In this case the sum of 15*l.*, which is secured in addition to the sums lent on the security of the goods assigned, is said to be in respect of interest, and bonus. That being so, part of that sum must be bonus, not interest. It is not stated how much of it is bonus, and it therefore follows that it is impossible to say how much is interest. If so, it would be impossible to calculate the rate of interest. Therefore on that ground the bill of sale would be bad. But assuming, as was suggested, that the words "bonus" and "interest" meant the same thing, and the 15*l.* was all interest, there would then remain the question whether, under this Act, the bill of sale may specify merely a lump sum for interest, leaving the borrower to calculate from such lump sum the rate of interest, even although such a calculation might be one requiring the qualifications of an expert arithmetician or actuary to make it. We cannot, I think, on this occasion decide that question, so as to create a binding authority on the subject. But it seems to me as at present advised that, if a bill of sale could be so framed, it would be letting in all the mischief that the Act, in my opinion, intended to prevent. I think that the effect would be that the borrower might be borrowing money without having any idea of the rate of interest he was to pay, whereas the intention of the legislature is that he shall be distinctly informed what such rate is, so that, if it be manifestly exorbitant, his attention may be called to the folly he is committing. It seems to me, therefore, that there are two fatal objections to this bill of sale, and there is a third objection which I am strongly disposed to think fatal also, though, in consequence of the existence of the two others, it is not necessary absolutely to decide that point. I

(1) 11 Q. B. D. 537.

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cannot say that, as at present advised, I agree with the view taken in *Thorpe* v. *Cregeen*. (1)

LINDLEY, L.J. I cannot understand this bill of sale otherwise than as entitling the grantee to seize and sell the goods on default in payment of any of the monthly instalments, and to retain the proceeds to the extent of the whole sum secured. If that is the true construction of it, the case comes directly within the authority of *Davis* v. *Burton*. (2) I must confess that I do not very well see how any form can be devised which will create a security of the nature contemplated by this bill of sale, and yet agree with the form given in the schedule to the Act, though I will not say it is absolutely impossible that such a form should be devised. But however that may be, I think the form adopted in the present case entirely fails. It appears to me that it is impossible to tell from this bill of sale what the rate of interest is, because the 15*l.* includes both interest and bonus, and it is impossible to say how much is one and how much the other. Even if the whole must be looked on as interest, it would be exceedingly difficult to calculate the rate of interest. I think on both these grounds that the form given in the schedule to the Act has been substantially departed from, and that the bill of sale is therefore bad.

LOPES, L.J. The intention of the legislature in passing the Bills of Sale Act (1878) Amendment Act, 1882, appears to have been to protect borrowers by making the transactions carried out by means of bills of sale as simple as possible. In furtherance of that purpose a statutory form of bill of sale is given which must be substantially complied with, and, if a transaction is not capable of being brought in substance within the form so given, the result is that such transaction will be avoided by the Act.

It appears to me that this bill of sale is bad on several grounds. In the first place it seems to me that the true construction of its terms is that the grantee may seize the goods on non-payment of any one instalment, and may then sell them and put in his pocket out of the proceeds of the sale the whole sum secured by

(1) 55 L. J. (Q.B.) 80. (2) 11 Q. B. D. 537.

the bill of sale. That being so, the bill of sale is bad on the authority of *Davis* v. *Burton*. (1) There is, as it appears to me another ground upon which the bill of sale is bad. The sum of 15*l*. is described as being bonus and interest, without defining how much is to be attributed to one and how much to the other, and consequently it is impossible for any one looking at the bill of sale to say how much interest was to be paid. This consideration alone seems to shew that it deviates substantially from the form given in the schedule. With regard to the question whether the rate of interest must be stated, it is worthy of observation how precise the provisions of the form in the schedule are on that point. It says, "and interest thereon at the rate of —— per cent. per annum [or whatever else may be the rate]," meaning thereby, as I understand it, that the bill of sale is to specify the percentage per annum, or per month, or whatever the rate may be; and the form then goes on: "And the said A. B. does further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal ——— payments of £—— on the —— day of —— [or whatever else may be the stipulated times or time of payment]," thus carefully keeping principal and interest entirely separate throughout. I believe that the intention was that the clearest possible information should be given to the borrower as to the rate of interest which he was paying; and, therefore, speaking for myself, I do not think that a bill of sale can be made to provide in this way for capitalized interest or bonus without rendering it void under the Act. For these reasons I think that the appeal should be allowed.

Appeal allowed and judgment entered for the defendant.

Solicitor for plaintiff: *Myers.*

Solicitors for defendant: *Stevens, Bawtree, & Stevens.*

(1) 11 Q. B. D. 537.

E. L.

1886
Jan. 22.

[IN THE COURT OF APPEAL.]

EX PARTE PARSONS. IN RE TOWNSEND.

Bill of Sale—Validity—"Licence to take possession of personal chattels as security for any debt"—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 7, 9.

A document giving a licence to take immediate possession of goods as a security for a debt is a bill of sale within s. 4 of the Bills of Sale Act, 1878, and is, therefore, also a bill of sale within the Bills of Sale Act, 1882.

And although it is, from its nature, impossible that it should be made in the form given in the schedule to the Act of 1882, such a licence is void under s. 9 of that Act as substantially deviating from the prescribed form.

The ratio decidendi of *Ex parte Close* (14 Q. B. D. 386) and *In re Cunningham & Co.* (28 Ch. D. 682) disapproved.

APPEAL from an order of a Divisional Court (Cave and Day, JJ.), reversing a decision of the judge of the Brighton County Court, and declaring that certain documents executed by T. E. Townsend, a bankrupt, and dated respectively the 7th and 23rd of August, 1884, were void under the Bills of Sale Acts, 1878 and 1882, in respect of certain goods comprised in them, and ordering that the proceeds of those goods should be delivered up to the trustee in the bankruptcy.

On the 7th of August, 1884, Townsend, who was then residing at No. 28, Eaton Place, Kemp Town, Brighton, was in debt, and an execution had been levied on his furniture. He applied to John Parsons, who was an estate agent and a grocer at Brighton, to make him an advance of money, which Parsons agreed to do upon security being given to him on Townsend's furniture and other effects. The agreement between the parties was embodied in the following document, addressed by Townsend to Parsons, and signed by Townsend:—

"To J. Parsons.

"Augt. 7, 1884.

"Sir,—I hereby authorize and empower you to take immediate possession of all my goods, chattels, plate, and other effects at No. 26, Eaton Place, and to sell the same, either by public auction or private contract, as soon as convenient may be, and

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Ex parte Parsons. In re Townsend.

out of the proceeds thereof I authorize you to deduct any moneys due from me to you, and any accounts due from me to the tradespeople in and about Kemp Town, and, after deducting all proper charges for the sale of my effects and moneys advanced by you, to pay over to me the balance thereof."

On the execution of this document Parsons advanced 50*l.* to Townsend to pay out the execution, and a further sum in cash for his own use. Parsons intended at once to take possession of the goods, and had instructed an auctioneer to take the necessary steps for the purpose. Townsend requested him to defer taking possession until he (Townsend) and some friends or lodgers, who were then staying in the house, could conveniently leave. Parsons verbally agreed to comply with this request, though he received no consideration for so doing. Townsend accordingly remained in the house and in possession of the goods until the 6th of September, when he left and Parsons took possession. In the interval between the 7th of August and the 6th of September Parsons had made some further advances to Townsend, and on the 23rd of August Parsons wrote the following letter to Townsend:—

"Dear Sir,—In consideration of your giving me possession of all your goods, chattels, plate, and effects, at No. 26, Eaton Place, to be sold by public auction or private contract, I agree, in the event of your purchasing the Sussex Hotel, Brighton, to make any necessary advance for the purpose of carrying out the same on having a proper security, and upon such terms as to interest, &c., as may be agreed upon between us, it being understood that, out of the proceeds of the sale of effects at 26, Eaton Place, I am to deduct therefrom first a sum of 200*l.* due from you to Mr. T. A. Dewsbury, and also all accounts due from you to the tradespeople in and about Kemp Town, and all moneys advanced by me to you, the balance (if any) to be paid over to you, to go towards the purchase-money for the Sussex Hotel."

On the 10th and 11th of September, 1884, the furniture and other effects were put up for sale by the direction of Parsons under certain conditions of sale. Some of them were sold and paid for by the purchasers. Others were bid for by Townsend

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EX PARTE PARSONS. IN RE TOWNSEND.

and some friends of his, and were knocked down to them, but the purchase-money was not paid in accordance with the conditions of sale, and Parsons resumed and retained possession of these goods.

Neither of the documents was registered as a bill of sale.

On the 26th of November, 1884, a bankruptcy notice was served on Townsend on behalf of Messrs. Tapling & Co., in respect of a judgment debt, and on the 8th of December they presented a bankruptcy petition against him in the Brighton County Court, founded on his non-compliance with the notice. On the 3rd of February, 1885, a receiving order was made against him, and on the 12th of March he was adjudged a bankrupt.

The trustee in the bankruptcy applied to the county court for an order declaring the documents of the 7th of August and the 23rd of August, 1884, void as against him, and that the goods which remained in the possession of Parsons might be declared to be part of the property of the bankrupt divisible among his creditors. The judge dismissed the application. He was of opinion, on the authority of *Ex parte Close* (1) and *In re Cunningham & Co.* (2), that the documents in question were not bills of sale within the Bills of Sale Acts, 1878 and 1882, and that they were not rendered void by those Acts.

The trustee appealed to the Divisional Court.

1885. Nov. 17. *Philbrick, Q.C.*, and *Parsons*, for the trustee.

Cooper-Willis, Q.C., and *Edward Pollock*, for Parsons, referred to *Marsden* v. *Meadows* (3); *Ex parte Close* (1); *In re Cunningham & Co.* (2)

CAVE, J. I am of opinion that the appeal must be allowed, upon the ground that the document of the 7th of August was a bill of sale within the Act of 1882. In order to establish that proposition it appears to me only necessary to look at the language of the Acts of 1878 and 1882. Sect. 3 of the Act of 1878 says that "this Act shall apply to every bill of sale whereby the holder

(1) 14 Q. B. D. 386. (2) 28 Ch. D. 682.
(3) 7 Q. B. D. 80.

has power either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale." It is clear that by this document the holder had power "either immediately or at any future time to seize or take possession of" the personal chattels comprised in it, and the question, therefore, is whether the document is a bill of sale within the Act. We turn then to s. 4, which provides that the expression "bill of sale" shall include "bills of sale, assignments," and so on, "and also" (these are the material words) "powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt." It is clear that this document of the 7th of August contained a licence to Mr. Parsons to take possession of the goods and chattels, &c., in the grantor's house, and it was, therefore, as it seems to me, a bill of sale within s. 4 and also within s. 3 of the Act of 1878; and that the Act of 1878 was intended to have this wide meaning seems to me also clear from s. 6, which provides that "every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress." That shews that the legislature intended to include within the expression "bill of sale," not merely cases in which an interest actually passed to the grantee, but cases in which there was nothing more than a licence to take possession of personal chattels, when that licence was given in order to operate as a security for the payment of a debt. It is said, however, that there are two decisions which shew that this document is not a bill of sale within the Act. The first is *Ex parte Close* (1), a decision of mine. That was the case of a pledge, and, consequently, a case of an entirely distinct character from that with which we are now dealing. I there made use of these words (p. 393): "I am satisfied on the

(1) 14 Q. B. D. 386.

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construction of the Bills of Sale Acts that they do not include letters of hypothecation accompanying a deposit of goods by merchants or factors, or pawn tickets given by pawnbrokers, or in fact any case where the object and effect of the transaction are immediately to transfer the possession from the grantor to the grantee." When you look at the particular instances which I then gave, I think it is clear what I meant by "the object and effect of the transaction." A deposit by way of pledge involves a transfer of possession, and cannot be effected by a licence to take possession. In the same way a man can only pawn his watch by an actual transfer of possession, and I, therefore, added the words "any case where the object and effect of the transaction are immediately to transfer the possession." Now, let us see whether in the present case the object and effect of the transaction were immediately to transfer the possession of the goods to the grantee. There was no transfer of possession effected by the document, but merely an agreement in writing which gave Mr. Parsons immediate power to seize, and there was a parol stipulation or arrangement that he was not to put that power into force for an unspecified time, and in fact, without any further agreement having been come to, he did not put it into force until the 6th of September. The object and effect therefore, were not to transfer the possession at once, but to give Mr. Parsons an immediate power of taking possession, with the expectation that that power would not be exercised for some indefinite time; the case does not come within the rule which I laid down in *Ex parte Close*. (1)

The other case is *In re Cunningham & Co.* (2), in which Pearson, J., while agreeing with what I had said, suggested another test of his own. He said (p. 687): "Now, it was absolutely impossible, looking at what the transaction was, and what it was intended to be between the parties, that any bill of sale of these goods should have contained that clause. Then I am thrown back upon the construction at which Cave, J., arrives, namely, that the Bills of Sale Acts were not intended to refer to cases in which the possession of the goods was immediately given to the grantee, and he was directed to retain them; and, although this is one

(1) 14 Q. B. D. 386. (2) 28 Ch. D. 682.

transaction, I cannot see that that makes any difference at all." What Pearson, J., meant is, to my mind, very clear. He held that the effect of the transaction with which he was then dealing was at once to transfer the possession of the goods from the grantor to the grantee. The goods were not in fact in the possession of the grantor, they were in the possession of a wharfinger, who had given a warrant for them to the grantor, and that warrant was, upon the very day on which the transaction took place, handed over to the grantee, and he was at once placed in a position which enabled him, not only to have possession of the warrant, but to get from the wharfinger, as he subsequently did, a warrant for the goods in his own name. And what Pearson, J., said, clearly amounts to this, "It was the intention of the parties that there should be an immediate transfer of possession, and I cannot suppose that transactions of that character were meant to be included in an Act which applies only to documents giving power to take possession." If I may venture to say so, I entirely agree with the conclusion of Pearson, J., although I prefer to express it as I did in *Ex parte Close*. (1) The present case is not that of a pledge. It is not the case of an immediate transfer of possession; it is the case of a document giving a power to take immediate possession. It is said, however, that this being the agreement between the parties, effect cannot be given to it if the document is a bill of sale, because, by s. 9 of the Act of 1882, a bill of sale given as security for the payment of money is void, unless it is made in accordance with the form in the schedule to the Act, and, according to that form, Mr. Parsons, instead of being able to take immediate possession of the goods, could only take possession of them for the causes and at the time specified in s. 7. I confess I do not feel much pressed by this difficulty. If the intention of the legislature is that every bill of sale given as security for money shall be in the form in the schedule, I have not the slightest doubt that this document is a bill of sale within the Act of 1878 and within the Act of 1882, and it follows, therefore, and I do not shrink from the conclusion (it is not necessary to decide the point now, and I must not be taken as deciding it), that this kind of document cannot be in future given as a security for money. It is not,

(1) 14 Q. B. D. 386.

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however, necessary to go that length to-day, because there is a prior difficulty, viz., that this document, being a bill of sale within the Act, whether it was required to be in the form given in the schedule or not, at all events was required to be registered, and, as it has not been registered, it is upon that ground void as against the trustee in the bankruptcy. It is not necessary to say what would have been the consequence if this transaction had been carried out by an actual sale of the goods before the act of bankruptcy. My present impression is, that if that had been done before the grantor had demanded the goods back again, the sale might have been valid. But no such sale did take place. While the goods were still in specie Townsend committed an act of bankruptcy, and thereupon his rights were transferred to the trustee, and this bill of sale, which had not at that time been fully acted upon, became void by the statute as against the trustee, and upon that ground I think that the trustee is entitled to succeed.

It is said, however, that, even if that would have been the result, if matters had stood where they were upon the 7th of August, something which took place subsequently has given Mr. Parsons a new or more complete title. It is said that from time to time he advanced money to Townsend upon the faith of this document. That no doubt he has done, but the fact that he has done this does not, to my mind, put him in any better position. If, instead of advancing money upon the faith of this existing document, he had had another document, in precisely the same terms, executed to secure a subsequent advance, he would have been in exactly the same position, and it cannot matter whether he chose to rely on the existing document, which is wide enough in its terms to cover subsequent advances, or whether he chose to ask for a fresh document. In any case the document is void, and there is nothing in the least resembling a recognition by the parties that this was a void document, and the creation of a new and independent title. Mr. Willis contended that, at all events as regards advances made after he took possession, Mr. Parsons had a right of lien upon the goods. That, I think, must depend entirely on the arrangement which was made at the time. Undoubtedly a man who has goods in his hands may make an

advance of money upon the terms that he is to have a lien upon the goods for the sum advanced, and if that were done, I should, as at present advised, be inclined to think that such an arrangement would be valid. But, when we consider what the real nature of the transaction in the present case was, we find nothing of the kind. At that time Parsons had sold goods to the amount of about 170*l.*, and, although he had not actually received the money from the purchasers, still he had a right, with which Townsend could not interfere, to collect the money from them, and he was willing on the strength of that right to make an advance to Townsend. It is said that the 170*l.* which he was going to receive was not enough to pay the amount he was entitled to distribute before paying any money whatever to Townsend. That may have been so, and he may have relied upon a security which he supposed he had, but that cannot affect the question; he chose to rely upon the security, and, relying upon it, he made the advance upon the credit of the moneys he was about to receive from the purchasers. That being so, the whole of his debt remained due to him and secured by the document of the 7th of August, and, as that document is, in my judgment, void as against the trustee, because it was not registered, the result is that he cannot enforce his claim. He has no title to the goods which he can enforce against the trustee.

DAY, J. I entirely concur in the judgment of my Brother Cave.

From this decision Parsons appealed.

Jan. 22. *Cooper Willis, Q.C.*, and *Gore*, for the appellant. (1.) The document of the 7th of August is not a bill of sale within the meaning of the Bills of Sale Acts of 1878 and 1882, and therefore it did not require registration, nor is it made void by s. 9 of the Act of 1882. (1)

(1) Sect. 3 of the Act of 1878: "This Act shall apply to every bill of sale executed on or after the first day of January, 1879 (whether the same be absolute, or subject or not subject to any trust) whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal

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A document which gives a right to immediate possession of goods is not a bill of sale within the Acts: *Ex parte Close* (1).

chattels comprised in or made subject to such bill of sale."

Sect. 4 provides that the expression "bill of sale" "shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents, that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehousekeepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented."

Sect. 3 of the Bills of Sale Act, 1882: "The Bills of Sale Act, 1878, is hereinafter referred to as 'the principal Act,' and this Act shall, so far as is consistent with the tenor thereof, be construed as one with the principal Act; but unless the context otherwise requires shall not apply to any bill of sale duly registered before the commencement of this Act so long as the registration thereof is not avoided by non-renewal or otherwise.

"The expression 'bill of sale,' and other expressions in this Act have the same meaning as in the principal Act, except as to bills of sale or other documents mentioned in s. 4 of the principal Act, which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents this Act shall not apply."

Sect. 7. "Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

"(1.) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security;

"(2.) If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes;

"(3.) If the grantor shall fraudulently either remove or suffer the said goods, or any

(1) 14 Q. B. D. 386.

It is impossible from its nature that such a document can be made in the statutory form, therefore it cannot be within the Acts: *In re Cunningham & Co.* (1)

(2.) Registration was not required to perfect the title of the grantee, because he took a sufficient possession of the goods before the presentation of the bankruptcy petition.

(3.) Even if the document of the 7th of August is void under the Bill of Sale Acts, there is evidence of a subsequent independent parol agreement under which the appellant took possession of the goods, and this gives him a good title against the trustee. The document, if it is void as a bill of sale, may be good evidence of a debt. The appellant had an equitable right to be paid his debt out of the proceeds of the sale of the goods, and the bankruptcy cannot affect the specific appropriation of their proceeds.

Philbrick, Q.C., and *Parsons*, for the trustee. Both the documents are clearly within the meaning of the term "bill of sale," as defined by s. 4 of the Act of 1878. Each of them is a "licence to take possession of personal chattels as security for a debt." Sect. 3 also applies. If a bill of sale given as security for money is not made substantially in the form in the schedule to the Act of 1882, it is void altogether under s. 9, even though the agreement between the parties cannot be expressed in that form. This Court can, if necessary, overrule *Ex parte Close* (2), and *In re Cunningham & Co.* (1) There was no independent contract after

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of them, to be removed from the premises;

"(4.) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes;

"(5.) If execution shall have been levied against the goods of the grantor under any judgment at law."

Sect. 9. "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

The form of bill of sale given in the schedule to the Act contains this clause—"Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said (grantee) for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882."

(1) 28 Ch. D. 682.

(2) 14 Q. B. D. 386.

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the document of the 7th of August giving the appellant a right to the possession of the goods. No consideration was given for the document of the 23rd of August.

Cooper Willis, Q.C., in reply. Sect. 3 of the Act of 1878 applies only to documents which are strictly bills of sale, not to other documents which are by s. 4 included in that expression.

Lord Esher, M.R. Whatever the verbal agreement between Townsend and Parsons may have been, the terms of it were reduced into writing by the document of the 7th of August. That being so, we cannot look at anything but the writing; the writing is the sole evidence of the agreement whatever it was. When you look at the written document it is obvious that the agreement was not one of purchase and sale, but one of loan, and of loan on a security. Parsons was to advance money to Townsend, and as security for his advance was to have certain rights over Townsend's furniture. What were those rights? He was to have the right to take immediate possession of the goods and to sell them, and, after repaying himself the amount of his advance and certain other debts of Townsend, he was to account to Townsend for the surplus proceeds of sale. This being the agreement, and the intention on the face of the agreement being that Parsons should have the right to take immediate possession of the goods, on the same day an application was made by Townsend to Parsons to hold his hand and not to exercise the right which he had given to him, and which he, Townsend, could not take away, on the ground that the exercise of it would be injurious to Townsend's social position, he having friends or lodgers then staying in his house. He asked Parsons for an indulgence, and the indulgence was granted. Parsons agreed not to put his rights in force at once, but no consideration was given to him for this new promise. The moment he had made the promise he might have withdrawn it. It was not binding on him, and it had no effect whatever. At a subsequent period he took possession of the goods. He put a man in possession, and Townsend acquiesced in this and went out of possession. It is clear that this was done in exercise of the right supposed to have been conferred by the original agreement. Townsend was not aware that he could withstand this supposed

right, and he did not intend to give any new consent or enter into any new arrangement. Parsons not only took possession of the goods, but he instructed an auctioneer, who was his agent, to sell the goods for him, not for Townsend. The goods were accordingly put up for sale under certain conditions. Some of them were sold and taken away by the purchasers. Townsend and some of his friends bid for the others, and they were knocked down to them as purchasers. That constituted a contract that they should have the goods if they paid for them according to the conditions of sale; if they did not, Parsons was entitled to retain possession of the goods, because the conditions of sale had not been fulfilled. The goods were not paid for, and they remained in the possession of Parsons as the supposed vendor. Townsend has since become a bankrupt, and it is now alleged by the trustee in the bankruptcy that Parsons is not entitled to retain the goods (which remained in specie at the time of the bankruptcy), although he had taken possession of them before the bankruptcy. It was contended that, even if the document of the 7th of August was not a bill of sale under the Bills of Sale Acts, because a right to immediate possession of the goods was conferred by it, yet, inasmuch as possession was not in fact taken till some time afterwards, the omission to take immediate possession converted the document into a bill of sale though it was not one originally. In my view of the case it is not necessary to determine this point, but I am inclined to think that a document which was not originally a bill of sale could not be converted into a bill of sale by something which took place after its execution.

That the document is not a bill of sale at Common Law cannot be disputed. The question is whether any statute has made it a bill of sale. It seems to me that it is a bill of sale under the Act of 1878, as being within the words of s. 4 "a licence to take possession of personal chattels as security for a debt." Whether s. 3 applies to all documents which are comprised in the definition of a bill of sale in s. 4 is, I think, immaterial; I am inclined to think that it does. And, if it does, then there is an absolute enactment that the Act shall apply to every bill of sale whereby the grantee has power immediately to take possession of any personal chattels comprised in it. But, even if s. 3 does not apply,

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s. 4 says that the expression "bill of sale" shall include "licences to take possession of personal chattels as security for any debt." There is nothing to exclude a licence to take immediate possession; the words are sufficient to comprise such a licence, and there is nothing to cut them down. The document is not one of those which are excepted by the proviso at the end of s. 4. If it was one of the excepted documents, the proviso would strike it out of the Act altogether. But it is not one of those documents; it is a licence to take possession of goods as between two private individuals, and it therefore falls within s. 4. If the objection to it arose only under the Act of 1878, the objection could not prevail in the present case, because possession of the goods was taken by the grantee before the filing of the bankruptcy petition, and under such circumstances the document would not have been made void by s. 8 for want of registration. The question of its validity depends, therefore, on the Act of 1882. Is it, then, a bill of sale within that Act? Sect. 3 says that the two Acts are to be construed as one, and that the expression "bill of sale" is to have the same meaning in the Act of 1882 as in the Act of 1878, except as to bills of sale given otherwise than by way of security for the payment of money, to which the Act is not to apply. This document, therefore, is a bill of sale within the Act of 1882, because it is a bill of sale within the Act of 1878. Is it made void by the Act of 1882? The words of s. 9 are perfectly general, and they make void "every bill of sale made or given by way of security for the payment of money by the grantor thereof," unless it is made in accordance with the form in the schedule to the Act, i.e., as the Courts have held, substantially in accordance with the form. This document is not in accordance with that form, and therefore, if it is within the Act, it is void. Then this difficulty arises, that two learned judges, for whose opinion we have the greatest respect, have in substance held this—that, when there is such an ordinary transaction as an advance of money upon the security of goods, the arrangement being that possession of the goods is to be given to the lender immediately, you cannot by any possibility express the transaction in the statutory form, and therefore the legislature could not have intended to deal with such a transaction at all. The true conclusion must therefore be,

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that s. 9 does not apply to a document by which the right to immediate possession of goods is given. The legislature could not have intended to prevent such transactions altogether. Is that a process of reasoning which the Court ought to allow? The words of s. 9 are quite general; there is no exception of a document which gives a right to the immediate possession of goods. The section says that the bills of sale to which it refers shall be void, even as against the grantor, unless they are made in the prescribed form. In the present case the document of the 7th of August is the only agreement which gives the appellant a right to the possession of the goods; if that document is void, there is no agreement which gives him a right to possession. Is it, then, a true inference that the legislature did not intend to strike at such a transaction as this? It is said that they could not have intended to do so, because there is nothing to prevent such a transaction being carried out verbally. But we know that, before the Act of 1882 was passed, certain forms of documents were in use by money-lenders as a means of puzzling ignorant borrowers, and that even a practised solicitor could not easily advise borrowers as to the meaning of those forms. It was, therefore, against written documents that the legislature intended to act. That being so, we are not entitled to say that the legislature have gone further than the mischief which they wished to remedy required; they might have gone further, and have forbidden such written documents altogether. And, if they have forbidden every such document except one which is made in a particular form, we are bound to give to their legislation the ordinary meaning of language. It seems to me that the words of s. 9 strike at all documents which give a security upon goods for the payment of money, and I take it the legislature intended to say, if you cannot make your agreement by a document in the form specified in the schedule, you shall not be able to make it by any document at all. I cannot, therefore, agree with the ratio decidendi of either of the two cases which have been relied upon. But I think that *Ex parte Close* (1) was obviously rightly decided, because the document there in question was one of those which are excepted by the proviso at the end of s. 4 of the Act of 1878, and for that

(1) 14 Q. B. D. 386.

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reason it was not within the Act. In *In re Cunningham & Co.* (1), Pearson, J., did not follow the actual decision in *Ex parte Close* (2), but he applied the doctrine, which was not necessary to the decision of that case, and I think he intended to agree with that doctrine. If his decision required the application of that doctrine I cannot agree with the decision; if it did not, still I cannot agree with the doctrine. In my opinion this legislation is very harsh against lenders of money on the security of goods. But it was necessary to protect some borrowers from the devices of unscrupulous money-lenders, and the Act applies to all lenders. This document, therefore, cannot be relied upon for any purpose, and the taking possession of the goods by Parsons was not authorized by any document at which the Court is entitled to look. Consequently, the decision of the Divisional Court was right, and the appeal must be dismissed.

LINDLEY, J. I have arrived at the same conclusion. I think the case is a very hard one against the lender of the money, but I cannot see my way out of the very stringent provisions of the Act of 1882. Looking at the definition of the expression "bill of sale" in s. 4 of the Act of 1878 I feel driven to say that this document of the 7th of August comes within it. Then we have to apply the Act of 1882 to this state of things. Sect. 3 of the Act incorporates the Act of 1882 with that of 1878, and provides that the expression "bill of sale" shall have the same meaning as in the Act of 1878, except as to bills of sale not given as security for money. This document is a bill of sale within the Act of 1878, and it was given as security for the payment of money by the grantor. We are, therefore, driven to apply the Act of 1882 to it, and, when that Act is applied, it seems to me demonstrable that the instrument is made void by s. 9. The Act of 1882 goes a great deal further than that of 1878, for it makes bills of sale which are not in accordance with its provisions void as between the grantor and the grantee. It is an excessively stringent Act, but the object was to protect needy borrowers against unscrupulous money-lenders. It, however, applies equally to honest lenders of money. If the Act of 1882

(1) 28 Ch. D. 682. (2) 14 Q. B. D. 386

makes the instrument void, all the rest follows easily enough. It follows that the parties cannot ratify or confirm a void agreement. The only thing which can help the appellant is the existence of some separate and independent transaction, giving him the right to possession of the goods. I have endeavoured to see whether it is possible to uphold the title of the appellant to these goods by virtue of some subsequent transaction, but I cannot see my way to do so. Everything which was done afterwards is attributable only to the original transaction, and I cannot strain the facts. The real point in the case is a very important one. It appears to me that the reasoning of the judges in the two cases which have been cited—that, because you cannot express a transaction in the form given in the schedule to the Act of 1882, therefore the Act does not apply to it—is erroneous. Sect. 9 of the Act of 1882 avoids every document by which goods are made a security for a debt, unless it is made in accordance with the prescribed form, if it is not one of the excepted classes of documents, and I think the true construction of s. 9 is that, if the transaction is not expressed in the statutory form and does not fall within the exceptions, it is void.

LOPES, L.J. I say without any hesitation that by the Act of 1882 the legislature intended to enact and did enact that all documents giving security upon goods for the payment of money (other than those excepted) should loyally follow the form prescribed in the schedule; and that, if they did not in substance comply with that form, they should be void. Having had considerable experience of the iniquities perpetrated by means of bills of sale, I think the Act is a very good and salutary one.

Solicitors for appellant: *Nash & Field, agents for Stuckey & Co., Brighton.*

Solicitors for trustee: *Plunkett & Leader, agents for Prince & Co., Brighton.*

W. L. C.

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Jan. 25.

[IN THE COURT OF APPEAL.]

RHODES *v.* DAWSON.
RUSH & CO., CLAIMANTS.

Practice—Security for Costs—Pauper or Insolvent Plaintiff—Interpleader Issue upon Application by a Defendant in an Action—Receiving Order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52).

The fact that a plaintiff is insolvent, and that there is a receiver of his assets, is not necessarily a ground for requiring him to give security for costs.

Malcolm v. *Hodgkinson* (Law Rep. 8 Q. B. 209) commented on.

A receiving order, made under the Bankruptcy Act, 1883, does not divest the debtor of his property; and what he recovers as plaintiff in an action is his property both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors, if he does not pay or compound with them. Therefore a debtor, against whom a receiving order has been made, ought not merely on that ground to be ordered to give security for the costs of any action in which he may be the plaintiff.

In considering whether parties to an interpleader issue ought to be required to give security for costs, the rules applicable to ordinary litigants ought to be observed, even although the interpleader proceedings have not been instituted by a sheriff; and in applying those rules the question, whether a party to an interpleader issue is to be treated as a plaintiff or as a defendant, must be decided by the real merits of the case, and not by the mere form of the issue itself.

The defendant entered into a contract with R., for the execution of certain repairs to her residence. R. employed the plaintiff to do the work. Afterwards a petition under the Bankruptcy Act, 1883, was presented against R., and a receiving order was made. The plaintiff thereupon commenced the present action to recover the cost of the work, and the defendant having interpleaded, it was ordered that the amount in dispute should be paid into court, and an interpleader issue was directed in which R. should be the plaintiff and the plaintiff in the action the defendant. The creditors of R. accepted a composition in satisfaction of their claims, and he was not adjudged a bankrupt. The Queen's Bench Division having ordered that R. should give security for the costs of the interpleader issue:—

Held, that the order was wrongly made, and must be set aside.

APPEAL from an order of the Queen's Bench Division directing that the claimant should give security for costs.

The defendant, Mrs. Dawson, instructed A. Rush, who traded as Rush & Co., and also as the Civil Service and General Store, to execute certain repairs at her residence at Wimbledon, in accordance with an estimate prepared by Rush and accepted

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by her. The plaintiff, Rhodes, who was a decorator by trade, was instructed by Rush to do the work referred to in the estimate, which he accordingly did, the defendant alleging that the work had been done in a most unsatisfactory manner. The account for such repairs was sent in to the defendant by Rush, who claimed the amount of the contract price and 13*l.* 10*s.* 4*d.* for extras. On the 12th of September, 1885, a creditor's petition in bankruptcy was presented against Rush, and on the 14th of September the petition was heard, and a receiving order made by consent. On the 22nd of September, A. A. James was appointed special manager of Rush's business. This being the state of affairs, the plaintiff Rhodes endeavoured to obtain from the defendant, Mrs. Dawson, payment of the amount of the contract price with the extras, and on the 12th of October a writ of summons was issued against her, and thereupon she issued an interpleader summons returnable for the 27th of October, making as claimant A. A. James, the special manager of Rush's business. On the return of the interpleader summons it was, on behalf of James, pointed out to the master before whom it came for hearing, that the defendant had committed a mistake in making James the claimant, and that the proper person to be made claimant was Rush.

The summons was adjourned to enable the defendant to amend it, which she accordingly did by inserting the following words:

"The Chief Official Receiver of the London Court of Bankruptcy, or —— James, special manager of Rush & Co., trading as the Civil Service and General Store, In Bankruptcy, claimants."

The official receiver was served with a copy of the summons, and attended the adjournment, when the master ordered that the defendant, Mrs. Dawson, should pay into court to abide further order the sum of 63*l.* 12*s.* 10*d.*, and that further proceedings in the action against her should be stayed; and that the plaintiff Rhodes, and the claimants should proceed to the trial of an issue in the High Court of Justice, in which Rush & Co. or their trustee should be plaintiffs, and Rhodes, the plaintiff in the action, should be defendant, and that the question to be tried should be whether the sum of 63*l.* 12*s.* 10*d.* above-mentioned was the property of the plaintiff or the claimants. This

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amount was paid into court forthwith; but Rhodes having appealed to Huddleston, B., sitting in chambers, that learned judge ordered that the order of the master should be varied by directing that the issue should be between the chief official receiver of the London Court of Bankruptcy and Rhodes, instead of between Rush & Co., or their trustee and Rhodes.

Rush appealed to the Queen's Bench Division (Mathew and A. L. Smith, JJ.) It was ordered by that Court, that the order of the master should be restored with the modifications, that the issue should be with the trustee, if any should be appointed within ten days; that if none should be appointed, then the issue should be with Rush & Co., on their giving security within ten days to the satisfaction of the master; and that if security should not be given, proceedings in the issue should be stayed, with liberty to the defendant in the issue to apply to bar the claimant, if the security should not be given within a reasonable time.

Rush appealed from so much of the order of the Queen's Bench Division as directed that he should give security for costs, and by his notice of motion prayed that the order of the master might be restored without modification.

It further appeared that at an adjourned first meeting of the creditors of Rush held on the 18th of November, 1885, a resolution had been unanimously passed for the acceptance by the creditors of a secured composition of 10*s.* in the pound, and that this resolution had been duly confirmed at a meeting of the creditors held on the 23rd of December, and that the Court of Bankruptcy had afterwards given its approval to the composition in pursuance of s. 18 of the Bankruptcy Act, 1883.

Jan. 23. *Sidney Woolf*, for Rush. In this case Rhodes was the plaintiff in the action and is the real plaintiff, although he has been made defendant in the interpleader issue; the contract was made by Mrs. Dawson with Rush, who, therefore, is primâ facie entitled to the benefit of it; and Rhodes ought not to be allowed to compel the real defendant, Rush, to give security for costs. But even if Rush is a real plaintiff, he is not compellable to give security for costs; the present case falls within the

principle of *Cowell* v. *Taylor* (1), which shews that mere poverty or even insolvency of a plaintiff is not a ground for requiring security for costs. It is only when the plaintiff is insolvent, and also has assigned away or been divested of his property and right of action, and is in fact suing for the benefit of others, that he can be compelled to give security. In the present case, there has been only a receiving order, which, under the Bankruptcy Act, 1883, has not the effect of divesting the debtor's estate; his property and rights of action are not divested until he is adjudged a bankrupt; and Rush has not been adjudged a bankrupt. *Ex parte Board of Trade, In re Parker* (2) is distinguishable, because in that case the debtors had been adjudged bankrupts.

J. L. Walton, for Rhodes, was called upon to argue. The order for security for costs was made by the judges of the Queen's Bench Division in the exercise of their discretion, and cannot be the subject of an appeal. But if the order is in its nature appealable, *Malcolm* v. *Hodgkinson* (3) is conclusive to shew that it was rightly made. *Malcolm* v. *Hodgkinson* (3) was followed as a binding authority in the case of *In re Carta Para Mining Co.* (4)

Sidney Woolf, in reply. *In re Carta Para Mining Co.* (4) is dealt with in *Cowell* v. *Taylor*. (5) The decision in *Malcolm* v. *Hodgkinson* (3) can hardly be supported; that was a case of a debtor who had presented a petition for the liquidation of his affairs under the Bankruptcy Act, 1869; and it was pointed out by Jessel, M.R., in *Ex parte Postmaster-General, In re Bonham* (6), that the mere presentation of a petition for liquidation did not divest the property of the debtor, which remained in him. The present case is not a sheriff's interpleader, and the order of the master was right. *Belmonte* v. *Aynard* (7) is directly in point.

Cur. adv. vult.

Jan. 25. LINDLEY, L.J. [The learned Lord Justice, after stating the facts, proceeded as follows:—] It was clearly a

(1) 31 Ch. D. 34.
(2) 15 Q. B. D. 196.
(3) Law Rep. 8 Q. B. 209.
(4) 19 Ch. D. 457.
(5) 31 Ch. D. 34.
(6) 10 Ch. D. 595, at p. 603.
(7) 4 C. P. D. 221, 352.

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mistake that before the judge at chambers the official receiver was made a party to the interpleader issue instead of Rush or his trustee. That oversight was, however, corrected in the Queen's Bench Division, and we have not now to consider it.

The first question which arises is, what is the true construction of rule 15 of Rules of the Supreme Court, 1883, Order LVII., which provides that "the Court or a judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable." The rule is a mere repetition of the last clause of s. 1 of 1 & 2 Wm. 4, c. 58; and although that statute has been repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), the interpretation put on the statute, ought to serve as a guide to the interpretation of the rule. I will cite four cases, which will be useful in determining the construction of the statute and of the rule. In *Benazech* v. *Bessett* (1) the plaintiff in the action, who was made also plaintiff under the interpleader rule, and was a foreigner resident abroad, was ordered to give security for costs upon the application of the claimant who was substituted for the original defendants in the action. In *Williams* v. *Crosling* (2) a defendant in an interpleader issue, being resident out of the jurisdiction, was ordered to give security for costs: in that case the defendant was an execution creditor and a real plaintiff: the claimants were the assignees in bankruptcy of the execution-debtor. Wilde, C.J., there said: "Seeing, therefore, that we shall neither place the execution-creditor in a worse position, nor the assignees in a better, by ordering the former to give security, and seeing that the statute refers it to the Court to make such rules and orders as the justice of the case may seem to require, I think the plaintiffs in the issue should have all such remedies for costs as ordinarily belong to litigants." In *Belmonte* v. *Aynard* (3) the plaintiff in an interpleader issue, although a foreigner resident abroad, was not ordered to give security, he being in substance the defendant. In that case the analogy existing as to the liability of ordinary litigants to give security, was followed. In *Tomlinson* v. *Land and Finance Corporation* (4) the defendant in

(1) 1 C. B. 313.
(2) 3 C. B. 957.
(3) 4 C. P. D. 221, 352.
(4) 14 Q. B. D. 539.

an interpleader issue was a real plaintiff, and being a limited company was ordered to give security for costs. Rule 15 of Rules of the Supreme Court, 1883, Order LVII., was referred to, but the analogy of previous decisions was followed.

I am of opinion that Order LVII., r. 15, must be construed in the same way as the statute from which it was taken. There is no greater discretion under the rule than there was under the Act; and the above authorities shew that in considering whether parties to interpleader proceedings ought to be required to give security for costs, the rules applicable to ordinary litigants ought to be observed. At the same time in applying these rules, the question, whether a party to an interpleader issue is to be treated as a plaintiff or as a defendant, must be decided by the real merits of the case and not by the mere form of the issue itself. It may be that in some cases each party is as much a plaintiff as the other. The present case is not a sheriff's interpleader, and Rush & Co. are both in form and substance in the position of plaintiffs claiming the money in question from Rhodes: at all events Rush & Co. are not more in the position of defendants than Rhodes; and if in an ordinary action, in which Rush & Co. were plaintiffs and Rhodes was defendant, Rhodes would be entitled to security for costs, the order appealed from would be right, otherwise not. The question, therefore, is narrowed to this: if an action is brought by a person against whom a receiving order has been made under the Bankruptcy Act, 1883, but who is not adjudicated bankrupt, can he be properly ordered to give security for costs? The law upon this subject is well summed up in the last edition of Chitty's Archbold, vol. 1, part 5, ch. 33, p. 398: "The plaintiff will not be compelled to give security for costs merely because he is a pauper, or bankrupt, or insolvent, and this even in a qui tam action. And this rule applies where the plaintiff is trustee of a bankrupt and is suing for the benefit of the estate; or where the plaintiff is suing as executor for the benefit of the testator's estate." The law relating to receiving orders is contained in ss. 5 et seq. of the Bankruptcy Act, 1883; and from them it appears that a receiving order is not equivalent to an adjudication of bankruptcy; it does not divest the debtor of his property, nor make him a bankrupt, nor place him under the disabilities of an

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adjudicated bankrupt. Notwithstanding a receiving order, the debtor is the only person who can sue for the recovery of what belongs to him; and if he does so sue, he cannot be regarded as the mere instrument of some other person or persons, and so be brought within the principle applicable to cases of that kind, unless and until he becomes bankrupt. What the plaintiff recovers in the action is his property both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors if he does not pay or compound with them. It may be that his property and right to sue never will be divested from him; and until it is, he is in no worse position as regards suing than any other plaintiff in embarrassed circumstances, and who may be made bankrupt at any moment if proper proceedings are taken against him. Upon principle, therefore, it appears to me that no security for costs ought to be ordered in such a case as this.

But it is contended that the case is covered by *Malcolm* v. *Hodgkinson*. (1) In that case security for costs was ordered to be given by a plaintiff, who was a liquidating debtor under the Bankruptcy Act, 1869, and a receiver of whose property had been appointed. This case was apparently followed in *Brocklebank* v. *Steamship Co.* (2), but without argument on the point whether security for costs could be ordered or not. *In re Carta Para Mining Co.* (3) Hall, V.C., followed those decisions, remarking, however, that they were departures from the old rule. *Malcolm* v. *Hodgkinson* (1) was decided on the ground that the case came within the rule, according to which an insolvent plaintiff suing as trustee for another can be required to give security for costs. But, as pointed out in *Carta Para Mining Co.* (3) by Hall, V.C., and by this Court in *Cowell* v. *Taylor* (4), this rule only applies where the nominal plaintiff is not the real plaintiff, but is a person whose name is used by some one behind him. The present case is clearly not a case of that description, and is not within the principle on which the Court appears to have proceeded in *Malcolm* v. *Hodgkinson*. (1) If *Malcolm* v. *Hodgkinson* (1) and the two cases, in which it was followed, are to be considered as laying

(1) Law Rep. 8 Q. B. 209.
(2) 3 C. P. D. 365.
(3) 19 Ch. D. 457.
(4) 31 Ch. D. 34.

down a general rule, that wherever a plaintiff is insolvent and there is a receiver of his assets, the plaintiff can be properly ordered to give security for costs, they go further than any other cases in the books, and cannot be reconciled with *United Ports and General Insurance Co.* v. *Hill.* (1) In that case an unlimited company, ordered to be wound up, brought an action to recover money due to it, and although a liquidator had been appointed the Court decided that the company could not be ordered to give security for costs. This decision appears to me to have been quite right, and to be inconsistent with any such rule as that which is sought to be deduced from *Malcolm* v. *Hodgkinson.* (2)

Such being the state of the authorities, there is nothing in my opinion to take this case out of the general rule, that the poverty and possible or probable bankruptcy of a plaintiff is not a ground for requiring him to give security for costs.

The appeal, therefore, must be allowed.

LOPES, L.J., concurred.

Appeal allowed.

Solicitors for Rhodes, plaintiff in the action: *Rodgers & Clarkson.*

Solicitor for Rush: *Charles A. Bannister.*

(1) Law Rep. 5 Q. B. 395. (2) Law Rep. 8 Q. B. 209.

J. E. H.

1886
Jan. 27.

[IN THE COURT OF APPEAL.]

STEWARD *v.* NORTH METROPOLITAN TRAMWAYS COMPANY.

Practice—Amendment of Pleadings—Prejudice to Plaintiff.

The defendants, a tramway company, were sued in respect of injuries alleged to have been occasioned to the plaintiff through their not having maintained a road upon which their tramway ran in a safe and proper condition. Six months after the close of the pleadings the defendants applied for leave to amend their defence by setting up a contract under s. 29 of the Tramways Act, 1870, by which the liability to maintain the road was shifted from them to the vestry, the road authority of the district. Since the close of the pleadings the statutory period of limitation within which the plaintiff could have sued the vestry had elapsed:—

Held, that the defendants ought not to be allowed to amend their defence, because the plaintiff could not be placed in the same position as if the defendants had pleaded correctly in the first instance.

Appeal from the order of the Queen's Bench Division (1) affirming the order of a judge at chambers, whereby he rescinded the order of a master who had given leave to the defendants to amend their statement of defence.

The action was brought against the defendants, a tramway company, to recover damages in respect of personal injuries alleged to have been sustained by the plaintiff through their not having maintained a road upon which their tramway ran in a safe and proper condition. The pleadings in the action were closed in May, 1885, and the case set down for trial. In the following November the defendants applied for leave to amend their statement of defence by setting up that there was at the time of the accident to the plaintiff a contract, under the 29th section of the Tramways Act, 1870 (33 & 34 Vict. c. 78), between themselves and the vestry, the road authority of the district, whereby, according to the decision in *Howitt* v. *Nottingham Tramways Co.* (2), the liability to maintain the road in proper condition was shifted from them to the vestry. It appeared that, when the defendants delivered their defence, the plaintiff would have been in time to sue the vestry, but that at the time of the application for leave to amend the statutory period of limitation within

(1) See 16 Q. B. D. 178. (2) 12 Q. B. D. 16.

which the plaintiff could have sued the vestry as road authority had elapsed.

R. V. Williams, for the defendants. The fact that the time has now expired within which the vestry could be sued is no reason why the defendants should not be allowed to amend. The plaintiff should before suing have ascertained against whom his right of action really was; the fact that he has neglected to do so and has sued the wrong party is no reason why the defendants, who must be assumed for the purpose of this application to be not in fact liable, should be precluded from setting up the facts and so subjected to a liability which by law is not imposed on them but on others.

Biale, for the plaintiff. The defendants ought to have set up the existence of a contract with the vestry at the proper time. It would be impossible for the plaintiff to find out before suing whether there is such a contract or not, and the defendants were the parties primâ facie liable under s. 28 of the Tramways Act, 1870. The defendants not having pleaded the contract, the plaintiff was entitled to think that there was no such contract, and proceed with his action. The result is that, if the defendants are now allowed to amend, the plaintiff will sustain an irreparable injury because he cannot now sue the vestry as he might have done if the defendants had pleaded the contract originally. He cited *Tildesley* v. *Harper* (1), and *Clarapede* v. *Commercial Union Association*. (2)

R. V. Williams, in reply.

LORD ESHER, M.R. I am not certain that in refusing this application we shall be doing any substantial harm to the defendants. That will depend on whether it should turn out that the decision in *Howitt* v. *Nottingham Tramways Co.* (3) can be upheld, as to which, however, I express no opinion, beyond saying that I do not feel at present quite clear that it can. The state of the case is this: the pleadings having been for a long time closed, the defendants allege that they have made a mistake in their statament of defence and seek to amend. Having thus

(1) 10 Ch. D. 393. (2) 32 W. R. 151, 262.
(3) 12 Q. B. D. 16.

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committed a fault in pleading they had given an advantage to the plaintiff through their own default. The question is whether, under the circumstances, the Court ought to deprive the plaintiff of that advantage. With regard to questions of amendment of pleadings, a rule has been enunciated by the Court, which is rather a rule of conduct than a rule of rigid law such as can never be departed from; because I take it that the Court might depart from it if there were very exceptional circumstances in any particular case leading the Court to think that it would not be right to apply it. It is nevertheless a rule of conduct which must be generally followed. The rule was thus laid down in *Tildesley* v. *Harper* (1) by Lord Bramwell, who there says: "My practice has always been to give leave to amend, unless I have been satisfied that the party applying was acting malâ fide, or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise." The subject was again discussed in *Clarapede* v. *Commercial Union Association* (2), where I stated the rule in terms substantially equivalent to those used by Lord Bramwell. I there said, "The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made." And the same principle was expressed, I think perhaps somewhat more clearly, by Bowen, L.J., who says that an amendment is to be allowed "whenever you can put the parties in the same position for the purposes of justice that they were in at the time when the slip was made."

To apply that rule to the present case; if the amendment is allowed now, will the plaintiff be in the same position as if the defendants had pleaded correctly in the first instance? If the defendants had in the first instance pleaded as they now ask to be allowed to plead, the plaintiff could have discontinued his action against the defendants, and then have given notice of action and brought an action against the vestry; but now, more

(1) 10 Ch. D. 393. (2) 32 W. R. 262.

than six months having elapsed, he can no longer sue the vestry. If, therefore, the amendment were allowed, the plaintiff could not be put in the same position, or compensated by costs or otherwise. It seems to me, therefore, that the Court below were right, and that this application should be refused.

LINDLEY, L.J. I am of the same opinion. I entirely agree with the terms in which the rule as to amendments has been laid down in the cases cited by the Master of the Rolls. I think an amendment ought always to be allowed, except when the other party cannot be placed in the same position, but an injury would be occasioned to him by the amendment which could not be compensated by costs. In the present case the matter stands thus. Assuming that the decision in *Howitt* v. *Nottingham Tramways Co.* (1) is correct, the plaintiff has sued the wrong party, if the defendants had made a contract with the vestry shifting the liability for the condition of the road on to them. But it was for the defendants to set this up, and I think any reasonable person would assume in the first instance that the defendants were liable to maintain the road, the liability being primâ facie imposed upon them. I do not think it was incumbent upon the plaintiff to go searching for a possible contract, the existence of which it might be very difficult to discover before action. It seems to me that a prudent business man might well bring his action, taking the risk of that, and discontinue afterwards if necessary. The plaintiff accordingly sued the defendants, and at a time well within six months from the accident the defendants put in their defence, which does not suggest that there was any such contract. Therefore, although no doubt they did not mislead the plaintiff into bringing his action against them, they may fairly be said to have misled him into continuing it against them after the defence. The plaintiff proceeds against them as any reasonable man would do, and in the meantime the period expires within which the vestry could be sued. Then the defendants seek to amend their defence and to set up the contract with the vestry. If they had pleaded this contract originally, the plaintiff could have sued the vestry, whereas now

(1) 12 Q. B. D. 16.

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he cannot. Therefore the plaintiff's position has been altered by the defendants' default in pleading in such a way that the plaintiff cannot be compensated by costs. For these reasons I think the appeal should be dismissed.

LOPES, J. I am of the same opinion. The plaintiff sued the defendants as being primarily liable for the condition of the road in the absence of a contract under the 29th section of the Tramways Act. Assuming even that the plaintiff ought in the first instance to have suspected the possibility of the existence of such a contract, the plaintiff was surely justified in supposing that there was not any, and in proceeding with his action against the defendants, after the defendants had pleaded without setting up any such contract. The period during which he could have sued the vestry has now expired. That being so, it seems to me that the rules with regard to amendment referred to by the Master of the Rolls and my Brother Lindley apply. Applying the rule as expressed in *Tildesley* v. *Harper* (1), it seems to me that the defendants would, if the amendment were allowed, have caused by their blunder an injury to the plaintiff which could not be compensated by costs. Applying the rule as expressed by Bowen, L.J., in *Clarapede* v. *Commercial Union Association* (2), if the amendment were now made, it is clear that the plaintiff could not be put in the same position as if the defendants had pleaded correctly in the first instance. For these reasons I think the decision of the Divisional Court was correct.

Appeal dismissed.

Solicitor for plaintiff: *Biale.*
Solicitor for defendants: *H. C. Godfray.*

(1) 10 Ch. D. 393. (2) 32 W. R. 262.

E. L.

CHADWICK *v.* BOWMAN. 1886 *Feb.* 1.

Practice—Inspection of Documents—Privilege—Copies made for Purposes of Litigation.

A correspondence had taken place between the defendant in an action and persons other than the plaintiff which was material to the questions at issue in the action. The defendant had not preserved the letters received by him or copies of the letters written by him in the course of such correspondence, but after action brought his solicitor, for the purposes of the defence to the action, procured through such third persons copies of the letters so written and received:—

Held, that such copies were not privileged against inspection by the plaintiff.

APPEAL from the order of Day, J., directing that the plaintiff should have inspection of certain documents which the defendant admitted to be in his possession by his affidavit of documents, but objected to produce on the ground of privilege.

The action was for the price of goods sold and work done, the defence being that the goods, &c., were not ordered by the defendant or by his authority. The defendant had written letters to third persons and received answers from them, and it appeared to depend on the terms of such correspondence whether he had given authority to such persons to order the goods, &c., on his behalf. The defendant had not preserved the letters so received by him, or any copies of the letters so written by him. After action brought the defendant's solicitor had procured copies of the before-mentioned correspondence through such third persons for the purposes of the defence to the action, which copies were the documents to which the order appealed against related.

Horne Payne, for the defendant, moved to rescind the order for inspection. The documents having come into existence for the purposes of the defence to the action are privileged against inspection. [He cited *The Palermo.* (1)]

Channell, Q.C., for the plaintiff, shewed cause. The originals of these letters would be evidence against the defendant. If the contention for the defendant is correct, all that a party would

(1) 9 P. D. 6.

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have to do would be to destroy original documents that would be evidence against him, having previously made copies, and then he could evade inspection by alleging that the copies were made for the purposes of the action.

DENMAN, J. I am of opinion that this order was rightly made. The originals of these documents would have been admissible in evidence against the defendant, and it seems to me that there is nothing in the circumstances under which the copies came into existence to render them privileged against inspection.

MATHEW, J. I am of the same opinion. I think that danger would follow if the privilege against inspection were made to cover such a case as this. It does not appear to me that these documents really came into existence for the purposes of the action within the true meaning of the rule upon which the defendant's counsel relied.

Order affirmed.

Solicitors for plaintiff: *Cunliffe & Davenport.*
Solicitors for defendant: *Gregorys, Rowcliffe, & Co.*

E. L.

Feb. 10.

[IN THE COURT OF APPEAL.]

TUCKER *v.* COLLINSON AND OTHERS.

Practice—Person suing in formâ pauperis—Right to be heard in person—Order XVI., rr. 22–30.

A person who has been admitted to sue as a pauper, but to whom no counsel has been assigned, is entitled to be heard in person.

APPEAL from the order of the Queen's Bench Division, affirming the order of a judge, whereby he affirmed the order of the master, who had stayed proceedings in the action under Order XXV., r. 4, as being shewn by the pleadings to be frivolous. The plaintiff had been admitted to sue in formâ pauperis, but no counsel or solicitor had been assigned to her.

The plaintiff appearing in person in support of the appeal,

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Lee Evans, for one of the defendants, took the objection, that the plaintiff, having been admitted to sue as a pauper, could not appear in person. Where a person is admitted to sue in formâ pauperis, the Court or a judge, under Order XVI., r. 26, is to assign him a counsel and solicitor, and he can only be heard by such counsel. So under Order XVI., r. 29, no notice of motion is to be served on behalf of a person admitted to sue as pauper unless it is signed by the solicitor.

[LORD ESHER, M.R.:—That rule seems only to apply where a solicitor has been assigned under rule 26.]

[He cited *Carson* v. *Pickersgill*. (1)]

LORD ESHER, M.R. The points which we have to decide are whether in the case of a person who has been admitted to sue in formâ pauperis the Court must assign counsel to such person, and whether, in the absence of any such assignment of counsel, the party so suing may be heard in person. Order XVI., r. 26, says that when a person is admitted to sue or defend as a pauper the Court or a judge may, if necessary, assign a counsel or solicitor, or both, to assist him. I do not think that these words can mean that in every such case the Court or a judge must assign counsel. Suppose the Court should be of opinion that the claim is utterly and obviously frivolous, as it is suggested that the present claim is; why should the Court be bound to oppress a counsel or solicitor, who has to give his services gratuitously, by holding it necessary as a matter of course in such a case that the pauper should have counsel or solicitor to assist him. I think the Court may consider the circumstances of the case, and, if they think fit, refuse to assign a counsel or solicitor. That being so, the question arises, what is to happen when a person has been admitted to sue in formâ pauperis, but no counsel or solicitor has been assigned, either because there has been no application to the Court to assign a counsel or solicitor, or because the Court has refused such application on the ground that it is not necessary to make such an assignment? Can it be suggested that the result is that the party cannot be heard at all? I do not think that can be so. It would be absurd that, a person having been admitted

(1) 14 Q. B. D. 859.

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to sue in formâ pauperis, it should then be impossible that he should be heard. It seems to me, therefore, that the plaintiff in this case is entitled to be heard in person.

LINDLEY, L.J. I cannot come to the conclusion that a person suing in formâ pauperis is necessarily precluded from conducting his own case. If a counsel and solicitor had been assigned, the case might have been different. Here no counsel or solicitor was assigned, and until such an assignment takes place I cannot see, either on principle or authority, why the pauper is not entitled to conduct his own case and to be heard in person.

LOPES, L.J. I agree. I see nothing in the rules to prevent a person who has been admitted to sue in formâ pauperis from appearing in person when no counsel has been assigned under Order XVI., r. 26.

[The argument of the appeal accordingly proceeded, and the the Court affirmed the order appealed against.]

Appeal dismissed.

Solicitor for defendant: *E. Chester.*

E. L.

THE HIGHWAY BOARD FOR THE DISTRICT OF LOUGHBOROUGH, LEICESTER, APPELLANTS; CURZON, RESPONDENT.

1886
Jan. 11.

Highway—Summary Proceedings for non-repair—Highway District—Admission by Waywarden—How far binding on Highway Board—5 & 6 Wm. 4, c. 50, ss. 94, 95; 25 & 26 Vict. c. 61, s. 18; 41 & 42 Vict. c. 77, ss. 3, 5, 7.

Where proceedings are taken before justices for the non-repair of a highway in a parish forming part of a highway district under 25 & 26 Vict. c. 61, a bonâ fide admission by the waywarden of the parish that the road is a highway which the parish is bound to repair is binding on the highway board, and it is not competent for them after such an admission to deny these facts so as to oust the jurisdiction of the justices.

SPECIAL CASE under s. 33 of the Summary Jurisdiction Act, 1879, by way of appeal against an order of two justices for Leicester, adjudging that a highway in the parish of Lockington, Leicester, was out of repair, and that the appellants were chargeable with the repair of it.

A summons had been issued under 25 & 26 Vict. c. 61, s. 18, upon the information of the respondent against the appellant highway board and against the waywarden of Lockington (within the district of the highway board), alleging that a highway in Lockington was out of repair, and the appellants being liable to repair it had neglected to do so.

The proceedings at the hearing are stated in the judgment, but it is sufficient for the present purpose to say that the waywarden admitted the liability of the parish to repair, and that the road was a highway as charged in the summons, and also that it was out of repair; and that the main question was whether the admission was conclusive so as to prevent the appellants from adducing evidence to the contrary, and so ousting the jurisdiction of the justices.

Jelf, Q.C. (*Sills*, with him), for the appellants. The highway board (consisting of the waywardens for all the parishes within the district), is by 41 & 42 Vict. c. 77, s. 7, the authority liable to repair the road (if a highway) out of their district fund, and is the only proper authority to admit or deny the liability to repair. Then the duty to repair being denied by the board, who also

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disputed the allegation that the road was a highway, the justices had no jurisdiction, *Reg* v. *Farrer* (1), and should have declined to make any order. The highway district ought not to be made liable without an opportunity of being heard before the justices, and it cannot have been intended that its interests should be intrusted to the waywarden of the parish, more especially as the parish is not liable to repair the highway, but only to contribute to the fund for its repairs. [He referred to 5 & 6 Wm. 4, c. 50, ss. 94, 95; 25 & 26 Vict. c. 61, ss. 10, 11, 17, 19; 41 & 42 Vict. c. 77, ss. 3, 5, 7, 10, 38.]

Shiress Will, Q.C., for the respondent. Under the Highway Act, 1835, ss. 94, 95, the surveyor of highways, as representing the parish, could admit the obligation of the parish to repair the highway, and was the only person who could be heard on the subject of liability. The waywarden of the parish under the Act of 1862 is placed in the same position for this purpose as the surveyor was under the Act of 1835: see 25 & 26 Vict. c. 61, ss. 5, 18. The provisions of the 10th section of the Act of 1878 (41 & 42 Vict. c. 77) are cumulative, and do not impliedly repeal the provisions of the former Acts with regard to parishes in highway districts, the remedy provided by that section when a road is out of repair, being another and a different remedy before a different tribunal, which is quite consistent with the continued existence of the former procedure. If it had been intended to take away the former remedy, the legislature would have expressly repealed the then existing provisions. Sect. 12 of the Act of 1878 is the only section containing an express repeal of any part of the Act of 1862.

[He cited *Reg.* v. *Odell* (2); *Young* v. *Davis.* (3)]

Sills, in reply. By s. 18 of the Act of 1862 the highway board is made a party to the proceedings, and that being so it must be entitled to raise the question—whether the road is a highway and to deny the liability to repair. The reason why under that Act the waywarden was made the party to deny the liability is that under that Act the parish alone was interested; under the existing legislation the expense of the repairs is thrown on the

(1) Law Rep. 1 Q. B. 558. (2) 21 L. T. 556.
(3) 7 H. & N. 760; 2 H. & C. 197.

whole district: see 41 & 42 Vict. c. 77, s. 7. It is a general rule with regard to summary proceedings, that where a bonâ fide question of title is raised the justices must hold their hands, and it is not reasonable that the highway board, who are a party to the proceedings and who are the persons chiefly interested, should not be heard to deny the liability to repair or that the road is a highway.

Cur. adv. vult.

Jan. 11, 1886. The judgment of the Court (Huddleston, B. and Wills, J.) was delivered by

WILLS, J. In this case a summons was taken out by the respondent, Mr. Curzon, against the appellants and Mr. Shepperson, waywarden of the parish of Lockington, complaining that a portion of an ancient highway within the said parish was out of repair, and that the appellants had neglected and refused to repair and amend the same.

Upon the hearing before the justices, the waywarden admitted that the road was a highway for all purposes, and that the parish was liable to repair it—the appellants sought to deny that it was more than a footway, and that there had been any dedication before 1836. The justices heard evidence to satisfy themselves that the admissions made by the waywarden were bonâ fide, and asked if the appellants had any witnesses to call. The appellants declined to call any witnesses, lest they should be taken to admit the jurisdiction of the justices. Upon an adjourned hearing the appellants asked to be allowed to give evidence to shew that they bonâ fide disputed that the road was more than a footway; this evidence the justices declined to receive, and after viewing the road under circumstances which must be taken as equivalent to a compliance with the 18th section of 25 & 26 Vict. c. 61, made an order upon the appellants for the repair of the road.

The principal and important question for our decision is, whether since the Act of 41 & 42 Vict. c. 77 (the Highways and Locomotives Amendment Act, 1878) the admission by the waywarden that the road was a highway which the parish were liable to repair, was conclusive, or whether it was competent to

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the appellants, notwithstanding his admission, to deny those facts, and so oust the jurisdiction of the justices.

By the Act of 1835, 5 & 6 Wm. 4, c. 50, s. 94, it was enacted that upon information being given to a justice that any highway was out of repair, a summons should issue requiring the surveyor of the parish or other person chargeable with such repairs to appear before the justices, who upon satisfying themselves, in the manner pointed out by the Act, that the highway is out of repair, shall convict such surveyor or other party liable to repair in a penalty, and shall make an order limiting a time for repairing the highway, upon the breach of which the surveyor or other person may be ordered to pay a sum sufficient to meet the expense of the repairs; provided nevertheless that the justices shall not have power to make such order in any case where the duty or obligation of repairing the highway comes in question. By s. 95, it is enacted that if on the hearing of any such summons the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, the justices shall direct an indictment to be preferred at the next assizes or quarter sessions against the inhabitants of the parish or the parties to be named in such order for suffering the highway to be out of repair, and it is directed that the costs of the prosecution shall be paid out of the highway rate. The construction that has been put by judicial decisions upon these sections is, that s. 95 has no application where the fact of the road being a highway is denied, and that in such a case the justices are bound to make no order under the statute, *Reg.* v. *Farrer* (1), but must leave the complainant to the ordinary remedy of an indictment at common law, no special provision being made in such a case for the costs. Where, however, it is admitted that the road is a highway, but denied that there is liability to repair on the part of the parish or other party alleged to be liable, the justices are required to make an order (under s. 95) for an indictment, in which case the costs of the prosecution will fall upon the highway rate. The "other party" referred to in those sections as possibly chargeable instead of the parish is a person or body who may be under special

(1) Law Rep. 1 Q. B. 558.

liability, such as that of repairing ratione tenuræ or clausuræ, or by virtue of special statute, as in cases in which canal or railway companies have been made liable by Act of Parliament to repair particular roads. It is clear that under the statute of 1835, the surveyor of highways was the only person entitled on behalf of the inhabitants either to admit or deny the fact of the road being a highway or the liability of the parish to repair.

By the Highway Act of 1862, 25 & 26 Vict. c. 61, highway districts may be formed by grouping together several contiguous parishes whose highways in the event of the formation of such districts are to be placed under the control and management of the highway board for the district. The board is to be composed of persons elected by the several parishes, to whom the denomination of waywardens is given, and upon the formation of such a district the office of surveyor of highways in any parish within it, is no longer to be filled up (s. 43).

The powers and duties of the surveyor are transferred to the highway board, except the power of making rates, for which special provisions are made by s. 21, and except the duty of representing the inhabitants of a parish in proceedings before justices under the Act of 1835, to compel the repair of a highway not in good order, a matter provided for in the following manner. By s. 17, the highway board is to maintain the several highways within the district, and (subject to the provisions of the Act) to perform the same duties, have the same powers, and be liable to the same legal proceedings as the surveyor but for that Act would have had, performed, or been liable to. By ss. 18 and 19, the proceedings under the Act of 1835, ss. 94 and 95, are modified, and it is provided, that upon complaint of non-repair made to a justice, *two* summonses, one addressed to the highway board, and the other to the waywarden of the parish liable to the repair of the highway in question, shall be issued. Upon the hearing, unless the board undertake to repair the road, or unless the waywarden deny the liability of the parish to repair, the justices, if satisfied by the report of the surveyor, or their own view, that the road is out of repair, shall make an order on the board limiting a time for the repair, and upon default, shall appoint some person to effect the repairs, and the expenses thereof, together with the

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costs of the proceedings, are to be paid by the board and deemed to be expenses of repair done to the particular highway. Where, however, the liability to repair is denied by the waywarden on behalf of his parish or by any party charged therewith, an indictment against the inhabitants of the parish or the party charged with the liability shall be, as theretofore, ordered by the justices, which indictment is to be tried at the next assizes or quarter sessions, the costs whereof are to be in the discretion of the Court, and if ordered to be paid by the parish, shall be deemed expenses incurred by the parish in keeping its highways in repair. By s. 20, the salaries of officers appointed for the district and certain other kinds of expenses are to be dealt with as expenditure for the common benefit, and to be charged upon the parishes in the district in proportion to the expenditure of the several parishes respectively for the three last preceding years, but the expenses of repairs and all similar expenses shall be a separate charge on each parish.

We think it clear that under the Act of 1862 the scheme established by ss. 94 and 95 of the Act of 1835 was substantially unaltered. The parochial liability to repair is clearly maintained. By s. 17 the highway board are substituted for the surveyor of highways. They are to perform the same duties and be liable to the same legal proceedings—and apparently only to the same legal proceedings—as the surveyor was. It is true that it is said that the board "shall maintain in good repair the highways," but the same liability is imposed by s. 6 of the Act of 1835 in almost exactly the same words upon the surveyor, and it has long been settled law that no indictment will lie against the surveyor: see *Young* v. *Davis*. (1) The order which under the former Act would have been made on the surveyor is under the Act of 1862 to be made upon the highway board, and they are therefore directed to be summoned, but no liability and no power is given to them which the surveyor had not before, and the duty of representing the *parish* in respects other than those in which the surveyor's duties have been transferred to the board, is vested in the waywarden. The cost of the repairs is, as under the Act of 1862, a charge upon the *parish*, and the expenses of a

(1) 2 H. & C. 197, Ex. Ch.

prosecution might fall upon them if, on their behalf, the liability to repair was denied. Upon them also might equally fall the cost of *defending* themselves against an indictment if either the fact of a road being a highway or the liability to repair were on their behalf denied, and it was their representative on the highway board who had the right of deciding on their behalf whether these expenses should be incurred or the liability admitted. It is worth while mentioning in this connection that we are informed that in the records of the Crown Office down to the year 1884 there is no instance of an indictment for non-repair against a highway board, though the records of indictment against parishes number between eighty and ninety.

It was argued that the expression, "or the party charged therewith," in s. 19 of the Act of 1862, being large enough to include the highway board, was meant to apply to it, and had rendered the board indictable under that Act. But a careful consideration of the enactments shews that this is not so. Sect. 95 of the Act of 1835 directed a summons to issue against the *surveyor*, if the *parish* was alleged to be liable, against the *party chargeable*, if the liability was alleged to be in *someone else*: and s. 95 directed that if the liability to repair were disputed by the surveyor on behalf of the parish the justices should order an indictment against the parish—if it were disputed by any other party (which means the party summoned as liable) an indictment should be preferred against him. Sect. 19 of the Act of 1862 alters the procedure in case of parochial liability by substituting the board and the waywarden (upon each of whom had devolved a part of the duties of the surveyor) as the parties to be summoned instead of the surveyor. It does not deal with the case of any other party alleged to be chargeable as to whom no alteration was necessary. But s. 19 alters the jurisdiction of the Court before whom the indictment is tried as to costs, and s. 19 accordingly deals with *both* cases—that of an indictment against the parish and that of an indictment against some other person alleged to be liable. The two possible cases of liability dealt with are those of the inhabitants, who are clearly treated as still the persons liable to indictment, notwithstanding the existence of the highway board—and (where the parish is *not* liable), the

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person who may be so. The contrast is certainly not between the inhabitants of the parish and the highway board. This is a very material consideration in dealing with the subsequent legislation, because by the Act of 1862 all independent action in the matter of repairs was taken from the parish, and yet the liability to indictment—and the sole liability to indictment—as well as the right of the elected representative of the parish to admit or deny on behalf of the parish both the fact of the road being a highway and the liability of the parish to repair were preserved.

By the Highway Act of 1864 the expenses chargeable to the individual parishes were directed to be apportioned not with reference to average parochial expenditure, but with reference to the rateable value of the property in each parish, but the cost of repairs to the highways in each parish was still treated as a liability of the individual parish.

By the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), an important change was made in the apportionment of the expenses of highways. By s. 7 (except in cases where the board may deem that special circumstances render it desirable to order otherwise) it is provided that all the expenses of keeping the highways of each parish in repair and all other expenses legally incurred by such board shall be defrayed out of the common fund and divided in the manner directed by the Act of 1864 amongst the several parishes according to the value of the rateable property in each parish, and at the same time an entirely new method of enforcing the duty of repair is provided.

By ss. 3 to 5 power is given in certain cases to place under the jurisdiction of a rural sanitary authority all the highways within its district, and the rural sanitary authority then becomes in effect the highway board of such district. As there are a great many parishes in England which have never become portions of a highway district, but have remained as from time immemorial managers of their own highway affairs, there may thus be under the Act of 1878, three kinds of highway administration: 1. By a rural sanitary authority; 2. By a highway board constituted under the Act of 1862; 3. By a surveyor of the parish constituted and acting under the 5 & 6 Wm. 4, c. 50. These three methods of administration are dealt with together under the Act

of 1878 by provisions applicable to what is therein called a "highway authority" (s. 38). By s. 10 it is enacted that where complaint is made—not as theretofore to special petty sessions, but to general or quarter sessions—that a highway authority has made default in repairing any highway, the sessions, after inquiry as directed by the Act, may make an order limiting a time for repair by the highway authority in question, and on default may appoint some person to effect the repairs, the expenses whereof, together with the incidental costs, shall be paid by the defaulting authority. Where, however, the highway authority alleged to be in default gives notice to the clerk of the peace within ten days after service of the order to repair that they decline to comply with such order, until their liability to repair has been determined by a jury, the sessions shall either satisfy the alleged defaulters by cancelling or modifying as such defaulting authority may desire the order in question, or else must submit to a jury the question of the liability of the defaulting authority to repair the highway. In the latter case, an indictment is to be preferred at the assizes to try the liability of the authority in question to repair the highway, and the order of sessions is to stand or fall according as the jury find the defendants guilty or not guilty. The costs of the indictment and of the proceedings consequent thereon are to be in the discretion of the Court before whom the case is tried, and any costs directed to be paid by the highway authority are to be deemed to be expenses properly incurred by such authority in the maintenance of the roads within their jurisdiction.

The proceedings with which the present case is concerned were proceedings before special petty sessions of the highways. To them s. 10 of the Act of 1878 has no application, and unless the contention of the appellants that the constitution by s. 10 of the new procedure, which it establishes, has the effect of repealing those portions of the Acts of 1835 and 1862, which relate to proceedings before justices in petty sessions, the present question must be determined as if s. 10 were not in the Act of 1878 at all. We can see, however, no trace of any intention on the part of the legislature to abolish the simpler and far less cumbrous and expensive method of proceeding under the earlier Acts. There

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is great difficulty in applying the provisions of s. 10 at all in the large class of cases in which parishes have not become component parts of a highway board, but manage their own highways, inasmuch as that section plainly contemplates the indictment of the defaulting highway authority—in the case of a parish managing its own highway, the surveyor of highways—who, as has been pointed out, is under no liability to repair except as an element of his duty to the parishioners who have appointed him, and who up to that time was certainly not subject to indictment if the road were out of order. The necessary delay which a recourse to proceedings under s. 10 would entail is so great that it would be most unfortunate if the simpler and more expeditious means of enforcing repair provided by the earlier statutes were abrogated and a complainant compelled to resort to the quarter sessions. We think it enough to say with respect to this point that there is no such express repeal, and that we can see no ground whatever for implying it.

It was, however, strenuously contended by Mr. Sills, in a very able and well-considered argument, that although the remedy before the justices in petty sessions may be still subsisting, the effect of the Act of 1878, which throws the cost of repair upon the common fund of the highway board, is to make the board the true defendants in the proceedings, and, therefore, to give them a right at common law to dispute the existence of the highway or the liability to repair it, and, therefore, to substitute them for the waywarden as the party entitled to admit or deny these matters before the justices. The answer seems to us to be that whether or not it would have been a fair corollary to the amendments of 1878 to have so enacted, the legislature has not done so. Putting aside s. 10, the Act of 1878 makes no express change in either the duties or the powers of the highway board, except as to the manner in which they shall apportion the expenditure; and we think it left the system of procedure at petty sessions unaltered. That procedure contemplates, and is based upon, the notion of primary parochial liability, although since 1862, where there was a highway board, the parish could do nothing towards keeping the road in repair except to complain by the mouth of the waywarden if it were allowed to become unfit for traffic.

Under the Act of 1862, although the duty of effecting the repairs was that of the board, no one but the inhabitants could be indicted, and the waywarden was by express enactment constituted the spokesman of the body whose liability to indictment depended upon his action. How can these liabilities and these rights be taken away by an Act which does not contain one word applicable to the procedure constituted by the Acts of 1835 and 1862?

It is said that it is unreasonable that the waywarden of a particular parish should thus be able to saddle the district with the repair of a road which it may suit the parish to acknowledge, but in which the rest of the district may have but little interest. It is, in our opinion, an unsatisfactory method of interpretation to assume a particular hypothesis as the sole reason why a particular enactment was passed, and then to say that because that hypothesis no longer answers to present facts, the particular enactment is repealed. But, apart from such a consideration, there is no reason for assuming that the incidence upon the parish of the cost of repair is the sole reason why the right of determining whether the liability of the parish shall be admitted at petty sessions is vested in the representative of the parish. The value of a particular highway may be very great to the dwellers in its immediate neighbourhood, may be nothing at all to those living a few miles off. A question which affects the convenience and comfort of many of the parishioners but which may be of supreme indifference to outsiders, except in a respect in which their interests are opposed to those of the parishioners, may very well be left (upon grounds quite apart from the incidence of cost) to the decision of their elected representative. It is assumed in any such legislation as that which relates to highway boards that the clashing interests of different localities are not incapable of reasonable adjustment. What may be the chance of parish A. to-day may be that of parish B. to-morrow. The highway board are not without a remedy in their own hands if unreasonable burdens should be thrown upon the common fund. If the highway board think that by reason of exceptional circumstances it is just that one or more parishes should bear the expenses of their own highways, they have power to compel them to do so (Act of 1878, s. 7).

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To us, therefore, there seems to be nothing absurd or unreasonable in a construction which leaves the waywarden still the person whose admission or denial of liability before the justices in petty sessions shall be conclusive, as up to 1878 it certainly was. Nothing short of a paramount necessity would justify us in introducing by decision and as a matter of implication important alterations of the statute law of which there is no trace in anything that has been expressed by the Act of 1878.

For these reasons we think the magistrates were right in acting upon the admission of the waywarden.

This view decides the other questions raised. The magistrates properly made such inquiry as was necessary to satisfy them that the action of the waywarden was bonâ fide. The evidence of the rejection, of which the appellants complain, was intended not to impeach the bona fides of the waywarden but to establish their own bona fides in desiring to maintain a different view to his as to the existence of the highway and the liability of the parish to repair it. Such evidence was, in our opinion, irrelevant, and therefore properly rejected.

The appeal, therefore, must be dismissed with costs.

Solicitors for appellants: *Field, Roscoe, Field, Francis & Osbaldeston, for Deane & Hands, Loughborough.*

Solicitors for respondent: *Crowder, Anstie, & Vizard, for Owston, Dickinson & Simpson, Leicester.*

A. P. S.

[IN THE COURT OF APPEAL.]

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Dec. 21.

LIGHTBOUND *v.* THE HIGHER BEBINGTON LOCAL BOARD.

Local Government Acts—Street—Apportionment of Expenses—Premises "fronting, adjoining, or abutting"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

A. B. owned plots of land and cottages thereon, separated from a street by a wall five feet high, which belonged with the land on which it stood to another person. There was a public footway which went between the plots of land, and through an opening in the wall into the middle of the street. The backs only of the cottages fronted the street, and the only way for vehicles from the cottages to the street was by a small roadway, which, without touching that part of the street which had been paved, came into a highway which joined one end of such street. With the exception of the public footway this roadway was the only access from the cottages to the street:—

Held, affirming the judgment of the Queen's Bench Division, that A. B. was not the owner of premises "fronting, adjoining, or abutting" on the street within the meaning of s. 150 of the Public Health Act, 1875, and therefore was not liable to contribute to the expenses of sewering and paving the street under that section.

APPEAL from an order of the Queen's Bench Division on a case stated at quarter sessions by justices of the county of Chester.

John Francis Lightbound was summoned before the justices for nonpayment of 58*l.* 4*s.* 1*d.*, which had been charged upon him by the Higher Bebington Local Board, under s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), as his proportion of certain expenses which had been incurred by such local board in sewering, paving, and channelling a street called School Lane, and for which he was sought to be made liable as the owner of two plots of land and cottages thereon alleged to be "fronting, adjoining, or abutting" on School Lane. The plots of land were divided from School Lane by a wall of five feet high, which, together with the land on which it stood, belonged to one Major Orred. There was a public footway which went between these two plots of Lightbound's land and through an opening in the wall of Major Orred into the middle of School Lane. The backs only of the cottages fronted School Lane, and between such backs

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and School Lane there was a passage common to the occupiers of all the cottages, and beyond such passage was the wall of Major Orred. There was no roadway for vehicles from the south end of School Lane, but a footway only, which led to and across a common, but from the north end of School Lane there was a carriage roadway which joined the high road, and by means of a passage or small roadway which ran from such north end, and at right angles therewith, but which did not touch the part of School Lane paved by the local board, there was access from the front of the cottages to School Lane. This last, with the exception of the public footway through the opening in Major Orred's wall, was the only access from either of the two plots of Lightbound's land to School Lane.

The Queen's Bench Division held that Lightbound's land and cottages did not front, adjoin, or abut on School Lane, and that therefore he was not liable to contribute to the expense of paving School Lane. (1)

The local board appealed.

Henn Collins, Q.C., and *C. Higgins*, for the local board. There is access from School Lane to the land and premises of Mr. Lightbound, by which carts can come there from School Lane. The intervention of the wall does not prevent such land and premises from "fronting, adjoining, or abutting" on the street called School Lane within the meaning of s. 150 of the Public Health Act, 1875. In *Baddeley* v. *Gingell* (2) a private yard with houses at the back of other houses which fronted a street was held to be *within* that street within the meaning of a local paving Act, so as to make its inhabitants liable to be rated in respect of paving such street, because there was an access from the street to the yard. By s. 105 of the Metropolis Local Management Act (18 & 19 Vict. c. 120) the liability is imposed upon the owners of houses "forming the street," and it was held in *London School Board* v. *St. Mary, Islington* (3) that a school-house, which was several feet from the street, but had access to it, formed part of such street within the meaning of that section.

(1) 14 Q. B. D. 849. (2) 1 Ex. 319; 17 L. J. (Ex.) 63.
(3) 1 Q. B. D. 65.

[BOWEN, L.J., referred to *London and Brighton Ry. Co.* v. *St. Giles.* (1)]

That case is commented upon by Lord Watson in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (2) as being a case in which the judgment was given on the express ground that the roadway of the bridge was not a new street, so that it became unnecessary to determine what would or would not have been the liability of the railway company if the bridge had been part of a new street. Actual contiguity is not necessary: *Newport Urban Sanitary Authority* v. *Graham.* (3) The observation of Cave, J., in that case—that if it had been shewn that a strip of land intervened between the premises and the street, they would not have been adjoining or abutting—is only a dictum, and was not necessary for the decision.

[LORD ESHER, M.R. Would Major Orred be liable to be rated in respect of his wall?]

If so, the owner of the stream and land which in *Wakefield Local Board* v. *Lee* (4) divided the premises there from the street would equally have been rateable, but the fact of there being such intervening land covered with water did not prevent the Court from holding in that case that the premises fronted, adjoined, or abutted upon the street within the meaning of s. 69 of the Public Health Act, 1848.

Bigham, Q.C., and *J. E. Bankes*, appeared for Lightbound, but were not called upon.

LORD ESHER, M.R. In this case the question is whether Mr. Lightbound, who is the owner of certain land and cottages, is or is not rateable in respect of the paving and making of a street called School Lane. That depends upon whether it can be said that these cottages either front, adjoin, or abut on School Lane.

Now the circumstances are these: There are two lines of cottages separated by a small footpath which runs down between them into School Lane. The backs, and not the fronts of these cottages, front towards School Lane, but between the backs of these cottages and School Lane there is a passage which is common to

(1) 4 Ex. D. 239.
(2) 8 App. Cas. 687, at p. 690.
(3) 9 Q. B. D. 183.
(4) 1 Ex. D. 336.

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Lord Esher, M.R.

all of them, and then between that passage and School Lane there is a wall which does not belong to Mr. Lightbound at all, but to a Major Orred. There is an access to the front of these cottages by means of a small roadway or passage for vehicles and carts at the north end of School Lane which leads out beyond that part which has been paved on to a road, the immediate access to which is from a high road leading from Stourton to Birkenhead. The other, or south end, of School Lane ends in a footpath which goes across a common, and there is no road for vehicles at that end of School Lane. It is admitted that the cottages which are apparently the most liable to be rated are those at the north end, and that if those are not rateable certainly those at the south end cannot be. There is also, as I have before stated, a small footpath in the middle between the two lines of cottages accessible from the cottages, and which leads down into almost the centre of the paved part of School Lane. Then, these being the facts, the question is whether these cottages can be said to be either "fronting, adjoining, or abutting" on School Lane. Such a question must, I think, be a question of fact, depending upon the facts and the application of rules which have been laid down in several cases. It cannot be truly said that any of these cottages actually front on School Lane, nor that any of them abut upon it so as to be contiguous to it; nor that any of them adjoin School Lane so as to touch it. Nevertheless, it has been pointed out in certain cases that that circumstance is not conclusive against their rateability, still the largest rule in favour of rating these cottages to my mind is that laid down by Cockburn, C.J., in *London School Board* v. *St. Mary, Islington* (1), and if it could be shewn that though these cottages do not actually front, or abut, or adjoin School Lane, yet that they have an access to that paved part which would give them a substantial advantage from the use of it, then, according to the rule laid down in that case, these cottages might be rated; but it seems to me that these cottages cannot be said to have an access which gives them any substantial or advantageous use of the paved part of School Lane so as to make them rateable even under the large rule given by Cockburn, C.J.

(1) 1 Q. B. D. 65.

The first difficulty in the way of there being any advantageous access to School Lane, is, that the passage or roadway at the north end does not open on to the paved part of School Lane but at the end just beyond it. It is not, however, necessary to decide whether that would be fatal to the rateability of these cottages as there are other facts which must be taken into consideration. There is this wall belonging to Major Orred, which prevents access to School Lane except by using a footpath which enters School Lane in the middle. Now School Lane is not paved for foot passengers, but for carts and other heavy traffic, and therefore the access by the footpath is of no use for this purpose, and may be struck out of consideration. Upon the facts of this case it is not reasonable to suppose that anything coming to these cottages from the south end of School Lane would come up in carts, for the only thing which would come in carts would only, under any reasonable supposition, come from the high road leading from Stourton to Birkenhead, and which if it did come from that direction for the benefit of these cottages, would not go along any part of School Lane at all, but would come up the roadway or passage at the north end of the cottages. Therefore, to my mind, it would be unreasonable to believe that these cottages get any substantial benefit from any use of the paving of School Lane. If that is so, I cannot think that these cottages do, within the meaning of the Act of Parliament, front, adjoin, or abut on School Lane at all, and that therefore they are not rateable. It is not necessary to determine if the foot passage in the centre had been a carriageway, and it had been shewn that carts or carriages came up there to these cottages, whether they would then be deemed adjoining or abutting on School Lane. I determine this case upon the ground that taking the thing as it is, and that the only traffic which can be of any real substantial advantage to these cottages is such as it is shewn in fact to be, these cottages neither actually adjoin, or abut, or front School Lane, and that it cannot be said that they have any beneficial use of the paving of such street. Therefore I think the judgment of the Divisional Court was right, and this appeal must be dismissed.

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COTTON, L.J. The question we have to determine here depends on the true interpretation of s. 150 of the Public Health Act, 1875, as applied to the facts of this case. The local board have paved and channelled a certain street called School Lane, and they, therefore, contend that they are entitled under s. 150 to charge the owner of certain plots on which there are cottages with his proportion of the expense. What we have to consider is whether those plots, or either of them, front, adjoin, or abut on the part of School Lane which has been so paved and channelled. To a certain extent, possibly, a definition of the working rule as given by Cockburn, C.J., in *London School Board* v. *St. Mary, Islington* (1), may help us, though it was with respect to a different statute, where the words were "houses forming a street," and therefore different from those in this Act. The Chief Justice in that case considered that a house reasonably came within that description of a "house forming a street," if the access to it was over that street. But here there was a wall standing on land not belonging to the owner of these plots, and intervening between them and School Lane, and in my opinion such wall prevents these plots from abutting on School Lane.

Of course it is a very different thing where there is a wall belonging to the owner of the property tried to be rated, for such owner can take that down or make a gateway through it at any moment, and thereby avail himself to the full of the benefit to be derived from the work done upon the street. When, however, the wall belongs, as it does here, to another person, that wall entirely prevents the owner of a plot lying behind it from getting access to the street which has been paved. Now the only way for vehicles going from these cottages to School Lane opens on to a highway north of School Lane, and beyond that part of it which has been paved, so that the occupiers of these cottages are entirely unbenefited by the paving of School Lane.

That being so, in my opinion the intervening wall belonging to another person, does, as regards the point which I have been dealing with, prevent this property being considered as abutting on or adjoining or fronting the part of School Lane which has been paved, and that is the only part which we have really to

(1) 1 Q. B. D. at p. 73.

consider. Whether School Lane goes beyond the part that has been paved it is unnecessary to consider.

Then there is the footpath which lies between the two plots. I cannot say that that is the access to which the owner of these plots looked for the purpose of getting to the external world, and I cannot say that the mere fact that the footpath communicates with the paved footpath of School Lane would make us interpret the words of this 150th section in what is not, in my opinion, their natural sense, so as to include within the property liable to be charged these plots which do not adjoin, do not abut on, and do not front, this street. If it had been shewn that the real and only traffic was at the south end of School Lane, so that the only means of getting from these plots to the external world was by going over the paved part of School Lane, the question would be different. But as that is not the case, I do not think it is necessary to say what would then have been the result.

As regards the question whether the bit of land kept by Major Orred ought to be charged or not, that is not before us, and I give no opinion upon it.

BOWEN, L.J. I am of the same opinion. We have to decide what appears to me really a question more of fact than of law, though it may be a mixed question of fact and law, namely, whether these premises of Lightbound front, adjoin, or abut on that part of School Lane which has been paved and channelled. It seems to me to be almost as impossible to say exactly what "adjoining a street" means, as it is to explain what "street" means. We have been referred to the authorities of *Baddeley* v. *Gingell* (1) and *London School Board* v. *St. Mary, Islington* (2) to shew how the Courts have dealt with premises which were not actually a portion of the street which was being paved. Those cases, however, were decided upon other Acts of Parliament, where the words were different from those used in this Act. In the first of those cases the rate was to be levied on premises which were "within the street," and in the latter it was to be on premises which "formed part of the street," and those cases seem to me to shew that when you have got houses which are not

(1) 1 Ex. 319; 17 L. J. (Ex.) 63. (2) 1 Q. B. D. 65.

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actually within, or do not actually form part of the street, you must see whether the facts bring the case constructively within the meaning which the Act of Parliament intended. Cockburn, C.J., points out in *London School Board* v. *St. Mary, Islington* (1), that though the house may not actually form part of a street, yet it might be so for the purpose of the Act of Parliament if its real substantial access was from the street alone. That, of course, to my mind, is no sort of authority for the meaning to be put upon the words "front, adjoin, or abut," as they are used in the present Act of Parliament. The only way in which I think those cases are useful to us in the present case is to illustrate the manner in which we ought to construe the words which impose a rateable liability. In construing such words as "front," "abut," and "adjoin," in this Act of Parliament, actual contiguity is not necessary in order that the terms should be fulfilled. The case of *Wakefield Local Board* v. *Lee* (2) shews that. We have to go further and ascertain what is the true statutory meaning of this term as used in this section; and there is a broad rule of construction, of which the present case, so far as there is any law involved in it (which is very little), is to my mind an illustration. It is that in construing the words you must look at the subject matter of the section and see what is its scope and object. Here one has a section which presumably is intended to charge persons who are benefited by the work done, and as soon as one finds that, one gets a kind of light shed on the words "front, abut, and adjoin." With regard to "front" and "abut," it does not appear to me that these cottages in either plot can be said, in any fair use of language, to front or abut upon the part of the street which has been paved, and it seems to me, though it is not necessary to decide it, that the judgment of Cleasby, B., in *Wakefield Local Board* v. *Lee* (2) is preferable to that of Grove, J. There is in this statute a larger word, "adjoin," and we must see whether the cottages do not fall within the term "adjoin." Now, you cannot define adjoin as meaning benefit of access, or vice versâ, but in considering whether houses adjoin which are placed in close proximity to the part of the street which is to be paved, it is a most important fact, and, in many

(1) 1 Q. B. D. at p. 73. (2) 1 Ex. D. 336.

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cases, a dominant fact, to see whether there is a substantial access and advantage which the houses enjoy from that portion of the street which is to be paved, and a substantial access and advantage of that kind, coupled with close proximity, may bring the case within the word "adjoin," though there is no actual touch. It seems to me, however, when one looks at the circumstances in this case, that one finds not only that there is no actual contact, but that there is no such substantial advantage and no such close proximity as would induce one, within any reasonable meaning of the words, to say that these cottages adjoin that portion of the street which has been paved.

Appeal dismissed.

Solicitors for Local Board: *Burton & Co., for Tyrer, Kenion, Tyrer, & Simpson, Liverpool.*

Solicitors for Lightbound: *Chester, Mayhew, Broome, & Griffithes, for Weld, Liverpool.*

W. P.

Dec. 21.

THE DEWSBURY AND HECKMONDWIKE WATERWORKS BOARD APPELLANTS; THE ASSESSMENT COMMITTEE OF THE PENISTONE UNION, RESPONDENTS.

Poor-rate — Waterworks — Water-rates in aid of Water-Rents—Principle of Assessment to Poor-rate—Deduction for Repair of Property—39 & 40 *Vict. c. clxxxv., s.* 106.

By their special Act 39 & 40 Vict. c. clxxxv., the appellants, a local board, were empowered to make a public water-rate, but s. 106 provided that they should not levy any higher public water-rate than might be required to discharge so much of the expenses of maintaining the waterworks as the amount of water-rents and other payments for a supply of water should not be sufficient to discharge:—

Held, that in assessing the appellants to the poor-rate in respect of their reservoirs, pipes, and works, the amount collected by means of a water-rate ought to be taken into account; that a certain percentage on the total cost of the property might be allowed for wear and tear as the "probable average annual cost of repairs" within the Parochial Assessment Act (6 & 7 Will. 4, c. 96), s. 1; and that the adequate remuneration to a contractor for erecting the works was not the true measure of the net rateable value of the premises.

SPECIAL CASE under 12 & 13 Vict. c. 45, s. 11.

The Dewsbury and Heckmondwike Waterworks Act, 1876,

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was passed for the purpose of consolidating and amending the Acts then in force relating to the Dewsbury and Heckmondwike Waterworks, and of authorizing the construction of new works, and for other purposes therein mentioned. The appellants were a board incorporated under s. 3.

The respondents were the assessment committee of the Penistone Union in the West Riding of Yorkshire.

The appellants were the occupiers of certain rateable property in the township of Thurlstone in the respondents' union, and by the valuation list in force the appellants were and had been since the year 1875 assessed in respect thereof as follows:—

Name of Occupier.	Name of Owner.	Description of Property.	Name or Situation of Property.	Estimated Extent.	Gross estimated Rental.	Rateable Value.
				A. R. P.	£ s. d.	£ s. d.
Dewsbury and Batley United Board of Health.	Dewsbury and Batley United Board of Health.	Reservoirs, &c.	Dunford Bridge, Windledon.	53 0 0	2600 0 0	1600 0 0

On the 19th day of June, 1882, a rate was made in respect of the said property on the basis of the said rateable value of £1600.

On or about the 7th of July, 1882, the appellants gave notice of objection to the respondents, and having failed to obtain any relief the appellants on the 20th of September, 1882, gave to the respondents due notice of an intention to appeal against the said rate on the ground (amongst others) that they were overrated. The special case was afterwards stated as aforesaid.

Par. 6. The appellants' works in the respondents' union consisted of two reservoirs, which were used solely for supplying compensation water under the obligation imposed by the appellants' Act, and of 2 miles 770 yards of conduit and pipe with the necessary weirs and works which supplied the appellants' district, and the appellants derived no direct profit whatever in the respondents' union, and their property directly earned nothing there, but only indirectly conduced to the earnings and receipts of the appellants in their own district.

The amount which had been expended by the appellants upon

the whole of their works irrespective of the reconstruction of the embankment of a reservoir known as the Dunford Bridge Reservoir was 202,473*l.*, and the amount which had been expended by the appellants upon the re-construction of the said embankment was 18,300*l.* The respondents referred to ss. 127, 128, 130, and 131 with regard to the repayment of this sum.

Par. 8. Of the above sum of 202,473*l.*, 45,875*l.* and the whole of the said sum of 18,300*l.* were expended in the township of Thurlstone, but the said expenditure of 18,300*l.* did not increase the benefit of the appellants' occupancy either in the respondents' union or elsewhere, but the appellants had had and still had the full benefit of the expenditure of the said sum of 45,875*l.*, of which 41,000*l.* represented the two compensation reservoirs and 4875*l.* represented the conduit and pipe and other works mentioned in par. 6. The adequate remuneration to a contractor on the aggregate sum of 45,875*l.* would be not less than the present assessment.

Par. 9. The amount paid for interest upon borrowed moneys during the year 1882 by the appellants was the sum of 9902*l.* 3*s.*, and the amount received during the same year by the appellants was the aggregate sum of 15,878*l.* 17*s.* 1*d.*, of which 6,127*l.* 4*s.* 10*d.* was received from public water-rates and 9751*l.* 12*s.* 3*d.* from water rents. The public water-rates were levied to supply and did supply any deficiency between expenditure and the amounts received from water-rents which were the maximum rents allowed by the Act.

The ordinary working expenses of the appellants during the year 1882 amounted to the sum of 2118*l.* 8*s.* 3*d.*

Par. 10. The appellants or any hypothetical tenant of the waterworks required as working capital the sum of 2000*l.*, in respect of which a deduction from income at the rate of 7½ per cent. for interest and contingencies should be allowed but without any allowance for tenants' profits.

Par. 11. The total cost of the appellants' property subject to depreciation, wear and tear, or destruction, was 180,000*l.*, and 1*l.* per centum on that amount was a proper deduction to be made from income to form a reserve fund for renewals and replacement.

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Par. 12. The appellants contended that the net rateable value of the whole of their works was to be estimated as follows:—

	£	s.	d.
Total yearly income derived from water-rents, par. 9	9751	12	3
Expenditure as in par. 9	2118	8	3
	7633	4	0
Working capital 2000*l.*; interest thereon at 7½ per cent., par. 10	150	0	0
	7483	4	0
Reserve on 180,000*l.* at 1 per cent., as in par. 11	1800	0	0
	5683	4	0
Rates at 4 per cent. upon 4736*l.*, the percentage being admitted	947	4	0
	£4736	0	0

The appellants further contended that the net rateable value of their property in the respondents' union was to be estimated at the sum of 1073*l.*, which was ascertained as follows:—

Total Cost of Works.	Cost of Works in Township of Thurlstone.	Net rateable Value of the whole.	Net rateable Value in Township of Thurlstone.
£ 202,473	£ 45,875	£ 4736	£ 1073

On this contention the gross estimated rental of the works in the township of Thurlstone would be 1743*l.*

The respondents, on the other hand, contended that the net rateable value of the property which only indirectly contributed to the appellants' earnings, was to be estimated upon the principles laid down in the *Mile End Old Town Case* (1) and the *West Middlesex Waterworks Case.* (2) And the respondents further contended that the public water-rate, as well as the water-rents, had to be

(1) 10 Q. B. 208. (2) 1 E. & E. 716; 28 L. J. (M.C.) 135.

taken into account in estimating the rateable value of the property, which they contended was not occupied for public purposes, but for the private benefit of a section of the public, viz. the particular water consumers supplied by the appellants, and the rateable value should be the rent at which the property could reasonably be expected to let to a tenant who did not occupy the property for commercial purposes only, or who had the same power of levying a public water-rate as the appellants had.

If the Court should be of opinion that the appellants were right in their contention, the present assessment was to be reduced from 2600*l.* gross and 1600*l.* net to 1743*l.* gross and 1073*l.* net, but if the Court should be of opinion that the respondents were right the present assessment was to be confirmed.

The question for the opinion of the Court was whether the principles contended for by the appellants or those contended for by the respondents were correct, upon which the net rateable value of the property of the appellants in the respondents' union should be calculated, or on what principle and by what process the said net rateable value was to be ascertained.

A. Charles, Q.C. (*West*, with him), for the appellants. In estimating rateable value, the public water-rate ought not to be taken into account. By 39 & 40 Vict. c. clxxxv. (the Dewsbury and Heckmondwike Waterworks Act, 1876), s. 3, the Dewsbury corporation and the Heckmondwike board were incorporated, and by s. 47 the expenses and receipts of the waterworks are to be divided between them in certain proportions. Sect. 105 enables them respectively to make a rate called "the public water-rate," and s. 106 provides that "when the Dewsbury corporation or the Heckmondwike board shall have wholly paid off and discharged the amount which they are respectively by this Act authorized to borrow, the corporation or the board, as the case may be, shall not thereafter levy any higher public water-rate than may be required to discharge so much of the expenses of maintaining, repairing, restoring, and extending the waterworks, and of carrying this Act into execution with reference thereto, and of any damages, penalties, or other payments which the corporation or the board, as the case may be, may under the provisions of this

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Act be liable to pay or contribute towards, as the amount of water-rents and other payments for a supply of water which the corporation or board may under the provisions of this Act be entitled to, shall not be sufficient to discharge." That section provides for a rate in aid only. Suppose the annual expenses exceed the water-rents, the corporation may be called upon to levy a rate, and must do so. In finding out what the hypothetical tenant would give, the restrictions must be considered: *Mayor, &c., of Peterborough* v. *Stamford Union.* (1)

[SMITH, J. All that we decided in the *Peterborough Case* (1) was that on the facts and figures the hypothetical tenant would give nothing.]

It is only in event of the water-rent failing that the rate may be levied. In *Jones* v. *Mersey Docks* (2) a profit was made, but the destination of it was directed by Parliament, and the House of Lords held that as profits came to hand, although appropriated, the trustees were rateable.

The appellants contend that there is no beneficial occupation, and that the hypothetical tenant would not consider the rate in aid when estimating what he would give. If the hypothetical tenant would obtain no benefit he would not occupy, as Brett, M.R., pointed out in *West Bromwich School Board* v. *Overseers of West Bromwich* (3), and as Bowen, L.J., said (4): "In *Corporation of Worcester* v. *Droitwich Assessment Committee* (5) the judgments of both the High Court and the Court of Appeal are based upon the ground that the occupiers of land otherwise rateable were restricted by statute from using it for profitable purposes. *The Corporation of Peterborough* v. *Stamford Union* (1) was decided upon the same principle. In *Hare* v. *Overseers of Putney* (6) the judgments turned upon the same principle." Suppose the yield of the rate is exactly equivalent to the expenses of the waterworks, there is no rateable value. In the *Droitwich Case* (5) there was in fact a surplus, and therefore the property was held rateable. That case is a decisive authority in favour of the appellants. They are willing to be rated on the total rent of the works after deducting expenses.

(1) 31 W. R. 949.
(2) 11 H. L. C. 443.
(3) 13 Q. B. D. 929, at p. 941.
(4) At p. 943.
(5) 2 Ex. D. 49.
(6) 7 Q. B. D. 223.

But the rate in aid can never be raised except to make up a deficiency, and therefore the hypothetical tenant would not consider it. See also *Overseers of Chorlton-upon-Medlock* v. *Guardians of Chorlton Union.* (1) The one per cent. deduction for depreciation of the property by user should certainly be allowed. The sum which a contractor might charge is not the true test of the rateable value of the works.

Castle (*Jelf, Q.C.*, with him), for the respondents. The appellants have not distinguished between property used for private purposes and property used for pecuniary purposes For example, a railway station makes profit by means of the railway; but no tenant would be found for a station only. In the *Mersey Docks Cases* (2) directly productive property was alone under consideration. In *Reg. on the Prosecution of Hampton* v. *Company of Proprietors of the West Middlesex Waterworks* (3), a case as to the rateability of the company for their mains, the principle is stated thus: "But the tenants of the parts directly earning no profit would not be liable to be rated in respect of any rent in the ordinary sense—which is profit remaining after all deductions have been taken from the receipts. But as these parts of the apparatus, directly earning nothing, but indirectly conducing to such earnings elsewhere, are assumed to continue in operation, the company, to whose interest such continued operation is essential, must be assumed to pay adequate remuneration to a contractor for land and fixed capital vested therein, together with the labour and skill requisite for the effective continuance of such operation, and this contractor with the company would stand in the relation of occupying tenant to the parish, and the part within the parish would be the rateable subject, and the local rateable value would be such sum as would pay the rent of the land and the profit on fixed capital therein." (4) The question is whether the rule there laid down as to the adequate remuneration to a contractor, and which has been acted upon for thirty years, is to be abrogated. Outlay may or may not be a test of the rent a tenant would pay. In this case there is a reservoir properly made and a fair interest on the outlay is to be

(1) 51 L. J. (Q.B.) 458.
(2) 11 H. L. C. 443.
(3) 28 L. J. (M.C.) 135.
(4) Page 138.

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considered. The argument for the appellants is that the hypothetical tenant would give nothing because he would get nothing from the premises. But he must in this case be regarded in the double capacity of hypothetical landlord as well as hypothetical tenant. He receives rent with one hand even if he has to pay it into the other.

The difficulties in the decisions have arisen from the word "rent" used in the explanation of "annual value" in the Parochial Assessment Act. The learned judges who decided *Corporation of Worcester* v. *Droitwich Assessment Committee* (1) assumed that interest on outlay could not be raised under the Public Health Act. But that case has been rightly restricted in subsequent cases. The distinction between a statutory restriction on the land itself and on the occupiers was pointed out in *Overseers of Chorlton-upon-Medlock* v. *Guardians of Chorlton Union.* (2) Of *The Corporation of Peterborough* v. *Overseers of Wilsthorpe* (3), Lord Coleridge, C.J., said, in *West Bromwich School Board* v. *Overseers of West Bromwich* (4), that if the decision there was that there is no rateable occupation where the occupation of a thing valuable in itself chances not to be valuable in the hands of particular occupiers because they are occupying for public purposes and can make no personal profit out of it, then the decision directly conflicts with the judgment of the House of Lords in the *Mersey Docks Cases* (5), and Mathew, J., has dissented from the *Peterborough Case* (3), which is ignored in the *West Bromwich Case.* (4)

Next: the appellants may make no deductions. In the case of commercial speculations deductions may be made. But the corporation is not working to make profit, and a sinking fund for depreciation and renewal cannot be allowed.

A. Charles, Q.C., in reply. The restriction in this case is on the land and not on the occupier. That is the distinction between the *Chorlton Case* (2) and the *Stamford Case* (3), which are not inconsistent with each other. Both the *Droitwich Case* (1) and the *Peterborough Case* (3) are unimpeached in the *West Bromwich*

(1) 2 Ex. D. 49.
(2) 51 L. J. (Q.B.) 458.
(3) 31 W. R. 949.
(4) 13 Q. B. D. 929, at p. 936.
(5) 11 H. L. C. 443.

Case. (1) The one per cent. deduction is necessary to maintain the premises in a condition to command the rent, and therefore is rightly made: see *Reg.* v. *Wells* (2); *Reg.* v. *Cambridge Gas Light Co.* (3)

In the *Burstall Case* (4) the sinking fund was a sum set aside for the reduction of capital.

Cur. adv. vult.

Dec. 21. The judgment of the Court (Manisty and A. L. Smith, JJ.) was delivered by

MANISTY, J. The question left to us in this special case is, upon what principles and by what process the net rateable value of the appellants' property is to be ascertained. Three points were argued before us.

First, the appellants insisted that in ascertaining the net rateable value of their property the amount collected by means of the water-rate pursuant to the provisions of the 39 & 40 Vict. c. clxxxv., was not to be taken into calculation.

Secondly, they contended that the 1 per cent. upon 180,000*l.* for depreciation, wear and tear, *or* destruction of their property, should be allowed by way of deduction in estimating the net rateable value thereof.

And thirdly, they contended that what might happen to be the adequate remuneration to a contractor for erecting their works was not the true measure of what the net rateable value of their property was, as was argued by the respondents.

As to the first point:

It was contended that the effect of the provisions of the Dewsbury and Heckmondwike Water Act, 1876 (39 & 40 Vict. c. clxxxv.), ss. 3, 47, 91, 97, 98, 99, 105 and 106 was, that the water-rate was only to be levied as and when the amount received from the water-rents was insufficient to meet all the expenses, outgoings, and liabilities of the waterworks board and to make up any deficit there might then be, and that inasmuch as no tenant could possibly be found to give anything for a property from which he was unable to make any profit, therefore the amount recoverable

(1) 13 Q. B. D. 929, at p. 936.
(2) Law Rep. 2 Q. B. 542, at p. 548.
(3) 8 Ad. & E. 73.
(4) Times Law Rep. vol. i. p. 541.

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by means of the water-rate ought not to be taken into calculation when estimating what a hypothetical tenant would give for the property of the waterworks board. It was argued thus: Suppose, said the appellants, that by their Act it was enacted that the board should acquire assets solely by means of a water-rate, and that by the same Act it was provided that no more should be levied by this rate than was required to meet all expenses, outgoings, and liabilities, in such case, they said, surely the hypothetical tenant would give nothing for a property out of which it was only possible to receive assets equal to the amount of the outgoings. That was their argument: we think, however, for reasons below, that it cannot be maintained. In *Jones* v. *Mersey Docks* (1) it was expressly held that all property capable of beneficial occupation, and which if let to a tenant was capable of producing a rent (excepting always property occupied by her Majesty or her servants) was rateable.

As to what constitutes a beneficial occupation, Mr. Justice Blackburn in delivering the opinion of the majority of the judges in the House of Lords (2) said: "In order therefore that a valid rate may be imposed, it is essential that the occupation should be of value beyond what is required to maintain the property, for if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent or a rent which after deducting the average annual expense of the maintenance would leave no overplus, there is nothing to rate."

The cases of *Jones* v. *Mersey Docks* (1), already mentioned, *Mayor and Corporation of London* v. *Stratton* in the House of Lords (3); *Corporation of Liverpool* v. *Wavertree* (4); *Hare* v. *Overseers of Putney* (5); and *West Bromwich School Board* v. *Overseers of West Bromwich* (6) have, as it seems to us, decided that if property is incapable, by reason of the prohibition placed upon it by statute, or by reason of its barrenness which cannot be cured, of yielding a profit *in any one's occupation*, then it is not rateable; but that if the property is not absolutely prohibited by statute from being occupied at a profit by *any one*, or is not the barren

(1) 11 H. L. C. 443.
(2) At p. 461.
(3) Law Rep. 7 H. L. 477.
(4) 2 Ex. D. 56.
(5) 7 Q. B. D. 223.
(6) 13 Q. B. D. 929, 939.

rock spoken of by Lord Cranworth in *Jones* v. *Mersey Docks* (1) incapable of being occupied by any one at a profit, then it is rateable.

It was upon the same principle (as it seems to us) that the late Williams, J., and Smith, J., decided the case of the *Corporation of Peterborough* v. *Overseers of Wilsthorpe* (2) as was pointed out by Bowen, L.J., in the *West Bromwich Case* (3), when the case was under appeal.

In the *West Bromwich Case* (3) it was expressly decided that the school board were liable to be rated because their premises were capable of beneficial occupation in the hands of some one, though possibly not in theirs, and so also in the case of the *Overseers of the Poor of Chorlton-upon-Medlock* v. *Guardians of Chorlton Union* (4) it was held that inasmuch as the restriction was only upon the then tenant, the limitation of non-rateability contended for could not be maintained.

The case of *Reg.* v. *Burstall Local Board* (5) appears in no way to conflict with the above principles. And the case of the *Assessment Committee of the Altrincham Union* v. *Cheshire Lines Committee*, reported in the Court of Appeal since this judgment was written (6), is to the same effect.

Now, in the present case can it be said that there is imposed by the Act (39 & 40 Vict. c. clxxxv.) such a prohibition that there can be no beneficial occupation of the waterworks by any one? We will assume that Mr. Charles' contention is correct upon the terms of the statute, viz., that water-rate is never to be levied except to make up any deficiency there may be between the amount received from water-rent and the expenses, outgoings, and liabilities of the waterworks board. In this case the expenses, outgoings, and liabilities of the waterworks board include

£	s.	d.	
9902	3	0	per annum interest upon borrowed moneys;
2118	8	3	per annum for ordinary working expenses.
Total £12,020	11	3	

(1) 11 H. L. C. 443.
(2) 31 W. R. 949.
(3) 7 Q. B. D. 223.
(4) 51 L. J. (Q.B.) 459.
(5) Times Law Rep. vol. i. p. 541.
(6) 15 Q. B. D. 597.

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Manisty, J.

To meet these and other items should there be any deficit after collecting the water-rents, the water-rate is to be resorted to.

Take the following case: a man invests 200,000*l.* in, say, gas-works or any other property. His annual working expenses are, say, 2100*l.* a year; he has a fund provided for him upon which he may draw not only to recoup him his annual working expenditure but also to pay him 4 per cent. for interest upon his 200,000*l.* (viz. 8000*l.* per annum), could it be contended in such a case the occupation of the property is not a beneficial occupation? Surely not, and in our opinion it makes no difference whether the capital invested be or be not borrowed money.

We are clearly of opinion that the property in the present case is capable of being beneficially occupied, and that consequently it is rateable.

We are also of opinion that the amount collected by means of the water-rate ought to be taken into account in ascertaining the net rateable value of the property. It is in our opinion immaterial from what source the income is derived, so long as it is incidental to the ownership of the property.

As to the second question, viz, whether 1 per cent. upon the 180,000*l.* mentioned in the case has to be deducted in estimating the net rateable value of the property.

If we understand paragraph 11 of the case correctly, the question put to us is, in substance, whether the 1 per cent. should be allowed as the "probable average annual cost of repairs," see 6 & 7 Will. 4, c. 96, s. 1.

We answer this question in the affirmative: see *Reg.* v. *Wells.* (1)

As to the third point. We are clearly of opinion that what may happen to be the adequate remuneration to a contractor for erecting the appellants' works, is not the true measure of the net rateable value of their premises.

This is not the test applied by the Parochial Assessment Act, nor is it a test which has ever to our knowledge been recognized in a court of law; and, what is more, it is obviously so unreliable and fallacious, as was pointed out during the argument of

(1) Law Rep. 2 Q. B. 542.

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this case, that in our judgment no reliance whatever can be placed upon it.

In our opinion, inasmuch as the appellants have failed upon the main contention in this case, viz., as to whether or not the water-rate ought to be taken into account when estimating the rateable value of their property, the judgment should be given for the respondents with costs.

Judgment for respondents with costs.

Solicitors for appellants: *Ridsdale & Son.*

Solicitors for respondents: *Torr, Janeways, Gribble, & Oddie.*

J. R.

HEDGES & SON *v.* THE LONDON AND ST. KATHARINE DOCKS COMPANY.

Dec. 9.

Ship—Docks—London and St. Katharine Docks, Regulation of Vessels in—27 & 28 Vict. c. clxxviii., ss. 100 *and* 101—10 & 11 *Vict. c.* 27, *s.* 3—*Dumb Barge—"Vessel."*

A "dumb barge," a river craft which is simply propelled by means of oars, and having no rigging or other equipment, is not a "vessel" within the meaning of ss. 100 and 101 of the London and St. Katharine Docks Act, 1864 (27 & 28 Vict c. clxxviii.), notwithstanding the definition of the word "vessel" in the interpretation clause (s. 3) of the Harbours, Docks, and Piers Clauses Act, 1847, 10 Vict. c. 27, and consequently, the owner is not liable to a penalty for allowing her to remain in the docks regulated by the former Act without any person on board.

CASE stated by a police-magistrate under 42 & 43 Vict. c. 49.

At the police-court West Ham Lane, Stratford, Essex, a complaint was preferred by George Reader, agent of the dock company (the respondents), against George Hedges & Son (the appellants), charging them under the London and St. Katharine Docks Company's Act, 1864 (1), with having on the 12th of March, 1885, left a certain vessel, to wit, the barge *Grace*, of which the appellants were the owners, in the Royal Albert Docks without any person on board.

On the hearing it was proved that, on the 12th of March, 1885,

(1) 27 & 28 Vict. c. clxxviii.

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the dumb barge *Grace* was left in the Royal Albert Docks without any person on board, that the appellants were the owners of the *Grace*, and that she was simply propelled by oars.

It was contended on the part of the respondents under the London and St. Katharine Docks Company's Act, 1864, and under the Harbours, Docks, and Piers Clauses Act 1847 (1), s. 3, which is incorporated in the former Act, that the barge *Grace* was a "vessel" within the meaning of the above-mentioned Acts of Parliament, and that the fact of the vessel, viz. the barge *Grace*, having been left in the Royal Albert Docks without any person on board rendered the master or owner of the vessel liable to forfeit a sum not exceeding 5*l*.

On the part of the appellants it was admitted that at the time of the alleged offence there was no person on board the barge *Grace*: but it was contended, that she was not a "vessel" within the meaning of s. 101 of the London and St. Katharine Docks Company's Act, 1864, and s. 3 of 10 & 11 Vict. c. 27 (2); and that the appellants as owners of the barge *Grace* were therefore not liable to the penalties mentioned in the London and St. Katharine Docks Company's Act, 1864.

(1) 10 & 11 Vict. c. 27.

(2) Sect. 101 of 27 & 28 Vict. c. clxxviii. enacts that, "in case the dock-master judges any act or proceeding in the rigging, lading, or equipment of any ship or vessel injurious to the safety of the ship or vessel or to other ships or vessels lying in or entering or departing from the docks, basins, locks, cuts, or entrances, or to the docks and works, he shall give notice to the master of the ship or vessel, or to some other person on board and appearing to be in charge of the ship or vessel, to discontinue and alter the same; and in case the master shall not according to the direction suspend or alter the act or proceeding immediately after notice so given for that purpose; or if any ship or vessel be left in the docks, basins, locks, cuts, or entrances, without any person on board,—the master or owner of the ship or vessel shall for every such offence forfeit not exceeding 5*l*.; and the owner of the ship or vessel shall also be answerable for all the damage or injury sustained by any other ships or vessels or by the amalgamated company through neglect thereof."

Sect. 3 of 10 & 11 Vict. c. 27 enacts that "the following words and expressions in both this Act and the special Act and any Act incorporated therewith shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction, that is to say" (amongst others), "the word *vessel* shall include ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise."

The magistrate was of opinion that the barge *Grace* was a "vessel" within the meaning of the above Acts, and convicted the appellants in a penalty of 40*s.* and costs.

The question for the opinion of the Court was whether the conviction was right.

Finlay, Q.C. (with him *Cranstoun*), for the appellants. Reading ss. 100 and 101 of the London and St. Katharine Docks Act together, a barge such as that which is described in this case clearly is not a "vessel" within the contemplation of the Act, notwithstanding the definition given to that word by the interpretation clause s. 3 of the Harbours, Docks, and Piers Clauses Act, 1847, so as to render the owner liable to a penalty for leaving her in the docks without any person on board after notice from the dock-master to remove her. The whole context of the two first-mentioned sections is utterly repugnant to such a construction of the word "barge." That which is commonly called a dumb barge is without rigging or equipment,—expressions which are applicable to vessels having masts, spars, bowsprit, and sails,—so as to cause risk of accident or mischief to other craft entering or being in the docks, or to the docks, basins, or entrances, or to herself. There is no shelter or convenience for any person to remain on board her: and, throughout the Act, wherever the legislature has dealt with craft of her description, apt words have been used to describe it: see ss. 102—105. This matter was much considered in *Everard* v. *Kendall* (1), which was the case of a collision between two barges in the Thames.

E. Clarke, Q.C. (with him *Grain*), for the respondents. *Everard* v. *Kendall* (1) has no application to this case. There, a judge of a county court had assumed to exercise jurisdiction under 32 & 33 Vict. c. 51, in the case of a collision in the river Thames between two barges which like this barge were propelled by means of oars only, as to which the High Court of Admiralty itself had none; and the superior Court granted a prohibition to restrain him. Reading ss. 100 and 101 of the London and St. Katharine Docks Act together, the language is abundantly sufficient to include "barge" within the description of vessels comprised therein.

(1) Law Rep. 5 C. P. 428.

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The interpretation clause of the Harbours, Docks, and Piers Act, 1847 (which is incorporated with the London and St. Katharine Docks Act, 1864), expressly enacts that "vessel" in that Act and the special Act and any Act incorporated therewith shall include ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise. A barge is clearly within the mischief sought to be avoided by this Act: and this provision is the only remedy.

[WILLS, J. The dock company have power under s. 83 of the Act of 1847 to make a bye-law to meet the case.]

That power is much limited and restricted by s. 113 of the Docks Act of 1864, which defines the purposes for which the company may make bye-laws. The authority exercised by the dock-master in this case is one which has been exercised by him without question for many years; and the company will be much embarrassed in the conduct of their business if they are now for the first time to be told that it does not exist.

Finlay, Q.C., was not called upon to reply.

HUDDLESTON, B. The question for the opinion of the Court is, whether the dumb barge *Grace* is a "vessel" within the Acts of Parliament to which our attention has been directed. If so, the conviction is right: but, if the dumb barge *Grace* is not a vessel within the meaning of the Acts, then the conviction is wrong. Of course everything turns upon the interpretation we give to the different sections of the Acts.

If the mere question was whether this barge was a "vessel," I think we should be bound to say that it was. The definition given by the Harbours, Docks, and Piers Clauses Act, 1847, which by s. 3 of the London and St. Katharine Docks Act, 1864, is incorporated with that Act, is this,—"The word *vessel* shall include ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise:" and, if the mere question was whether a barge like that described in this case was a "vessel," I think it is clear that that question must be answered in the affirmative. But it is only to be so construed "unless there be something in the subject or context repugnant to such construction." When we come to examine the sections of the Act of

1864, it seems to be clear that it was never contemplated that a barge like this should be considered as a vessel within those enactments; and to hold that it is a vessel would be repugnant to the context and to the whole of the circumstances contemplated by those sections.

I will first deal with ss. 100 and 101. The contention on both sides is that those two sections must be taken together; and, speaking generally, it is obvious that the intention of the legislature was to give the dock-master certain powers with reference to the dismantling and so on of certain vessels, and to direct alterations to be made in pursuance of that power. Sect. 101 then provides that the notice to make those alterations shall be given to a definite person,—the master or some other person on board and appearing to be in charge of the ship or vessel; and, in case of default to comply with the notice, the master or owner shall be fined. It is obvious that the introduction of the words at the end of the 101st section are as it were ancillary to the original power given to the dock-master, viz. that, if there is no person on board to whom notice can be given, the master or owner shall be fined. That is clear from the words which are used. It is not, as Mr. Clarke puts it, that there is a specific enactment that if any ship or vessel be left in the dock or entrance without any person on board the master or owner shall forfeit 5*l.*: but that is connected with the previous part by the disjunctive "or:" and, when we come to read it, it is clear that if there is not any one on board upon whom the notice which the dock-master has power under s. 100 to give can be served, a fine may be imposed.

Now, let us read s. 100 in that light. "The dock-master shall have full power and authority to order all ships and vessels entering the docks, &c., of the company, or any of them, to be dismantled in such manner as he thinks proper and safe for the vessels so entering, and for the prevention of accident or mischief to other ships and vessels, or to lighters or craft, or to the docks and works." That is a provision for the regulation of ships entering the docks. The section goes on to provide for the safety of the vessel whilst unloading; and then it enacts that "the dock-master shall have full power and authority to give directions for topping, bracing, or striking yards or masts and

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taking in running bowsprits, and for having substantial hawsers and tow-lines and fasts to the dolphin mooring-craft, buoys, mooring-posts or rings, and also to regulate the equipment, rigging, and lading of all ships and vessels in the docks, basins, locks, cuts, or entrances, as he thinks necessary." Thus, he has a general power to order certain things to be done before the vessel comes into the docks and certain other things when she is in the docks. With regard to the dismantling and the quantity of ballast or dead-weight to be kept on board, these would not be applicable to barges: but the dock-master is empowered to give directions for having substantial hawsers and tow-lines and fasts to the dolphin mooring-craft, buoys, mooring-posts, or rings; and these would be applicable to barges. It is somewhat remarkable that, when we come to look at the 101st section, we find no penalty imposed for disobedience of these last-mentioned directions.

I now proceed to deal with s. 101. "In case the dock-master judges any act or proceeding in the rigging, lading, or equipment of any ship or vessel injurious to the safety of the ship or vessel or to other ships or vessels lying in or entering or departing from the docks, basins, locks, cuts, or entrances to the docks and works,"—that, again, would have reference to ships or vessels, but certainly not to barges,—"he shall give notice to the master of the ship or vessel, or to some other person on board and appearing to be in charge of the ship or vessel, to discontinue and alter the same; and, in case the master shall not according to the direction suspend or alter the act or proceeding immediately after notice so given for that purpose, or if any ship or vessel be left in the docks, basins, locks, cuts, or entrances, without any person on board, the master or owner of the ship or vessel shall for every such offence forfeit not exceeding 5*l.*," &c. The notice is to be given to the master of the ship or to some other person on board and appearing to be in charge of the ship; and if there is no person on board the penalty is equally to attach. It seems to me that this is not a penalty for leaving a vessel in the docks, &c., with no one on board,—in which case a "barge" might and probably would be included: but the provision is rather ancillary to that for the service of the notice upon the

master or other person appearing to have charge of the vessel,—the absence of the master or of any other person in charge in itself constituting the offence.

It is a remarkable thing that none of these provisions seem to be applicable to barges. Now, that is not a mistake or slip on the part of the legislature; for, when we come to look at ss. 103, 104, and 105, which contain provisions applicable to the removal and watching of combustibles, we find "barge" introduced eo nomine.

Seeing, then, that the legislature had fully in their minds the distinction between ships or vessels and barges, and seeing that none of the provisions of ss. 100 and 101 have any reference to barges save the expressions relating to hawsers, tow-lines, and facilities for mooring, as to which no penalty is imposed, I think it is clear that it was not intended that a barge such as that described in this case should come within the meaning of the term "vessel;" and therefore I must hold the conviction to be wrong. The case of *Everard* v. *Kendall* (1), which was cited in the course of the argument, seems to me to have nothing to do with the question: it merely decides that when Admiralty jurisdiction was conferred upon the county courts, those courts acquired no power to deal with a class of vessels which the High Court of Admiralty itself had no power to deal with. The respondent's counsel urges that the course adopted in this case is one upon which the dock company have always assumed to act, and that it will be a very serious thing for them if it be held that they have not the power they claim: but the inconvenience which he has suggested may probably be averted by a bye-law upon the subject which the company are empowered to make by s. 83 of the Harbours, Docks, and Piers Clauses Act, 1847, which Act is by s. 3 incorporated with the special Act. I therefore think the conviction must be quashed.

WILLS, J. I am of the same opinion. I think it is impossible to read ss. 100, 101, and 102 of the Act of 1864 together without seeing that, with regard to the power of the dock-master to deal with ships or vessels (understood in the ordinary sense) on

(1) Law Rep. 5 C. P. 428.

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the one hand, and lighters or craft on the other, a marked distinction is made, and that one scheme is provided in respect of the former and another scheme with regard to the latter. In the case of ships or vessels as commonly understood, viz. large craft propelled by means of sails or by steam-power, and having masts and rigging and what is called equipment, provisions are made for the dismantling, &c., and striking and bracing masts, yards, &c., and taking in running bowsprits, for the prevention of accidents or damage to the vessel or to other craft while entering or remaining in the docks, &c., and for notice to be given to the master, or to some person on board and appearing to have charge of the ship, to discontinue or alter that which the dock-master finds to be objectionable; and, as ancillary to that, a penalty is imposed upon the master or owner if the ship is left in the docks, &c., without any person on board to whom the notice can be given. But, with regard to lighters or other small craft without rigging or equipment, and as to which there is no necessity for a notice of the kind, a totally different scheme is provided, viz. by giving notice in writing to the owner, who in case of disobedience is subjected to a penalty of 5*l*. Placing the words "or if any ship or vessel be left in the docks, &c., without any person on board" within parentheses, s. 101 becomes sensible and intelligible, and the end of the clause,—"and the owner of the ship or vessel shall also be answerable for all the damage or injury sustained by any other ships or vessels or by the company *through neglect thereof*." These latter words "through neglect thereof," reading the section in the way I suggest, would become naturally connected until what went before, viz., the provision as to what shall ensue "in case the master shall not according to the direction suspend or alter the act or proceeding complained of" upon such notice. That is a natural way of reading the clause; and it seems to me therefore that a contrary interpretation which would include "barge" within the words "ship or vessel" is really repugnant, not to the subject-matter, but to the context. I cannot agree with the suggestions that the language of ss. 100 and 101 necessarily or even reasonably include a barge like this.

With regard to the power of the company to make bye-laws, under s. 113 of their special Act, I do not think that that section

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at all interferes with the general power to make bye-laws conferred by s. 83 of the general Act which is incorporated with the special Act. I doubt very much whether a bye-law such as has been suggested, which would compel the owner of every barge entering into or remaining in the docks to keep a man on board, would be one which it would be competent to the company to make under either section. I also doubt whether the provision as to the regulation of the lading of vessels would be applicable to craft of this description. Every one who walks with his eyes open must be familiar with the fact that, with few exceptions, barges have no convenience for shelter or residence.

Upon the whole, I come to the conclusion that ss. 100 and 101 when carefully considered leave the matter quite free from doubt, and therefore I concur with my Brother Huddleston in thinking that the conviction must be quashed.

Conviction quashed.

Solicitors for appellants: *J. A. & A. E. Farnfield.*
Solicitors for respondents: *C. O. Humphrey & Son.*

J. S.

KIDDLE & SON *v.* LOVETT.

Dec. 12.

Damages, Measure of—Contract—Breach.

A "boat-staging" or suspended platform, put up for the plaintiffs by the defendant under a contract between them, to enable the plaintiffs to paint a house, fell, through being insecurely fastened by the defendant, and hurt a painter in the employment of the plaintiffs. He brought an action under the Employers' Liability Act (43 & 44 Vict. c. 42) against the plaintiffs for injuries sustained in consequence of the defective state of the boat-staging. The plaintiffs settled the action by paying to the painter 125*l.*, and then sued the defendant for breach of his contract:—

Held, that the defendant was liable under the contract; but that, inasmuch as the plaintiffs had employed a competent contractor to put up the boat-staging, and there was, on the facts, no evidence of negligence by the plaintiffs, they were not liable to their servant for the injury he had sustained, and therefore the money which they had paid to settle his action was not recoverable as damages from the defendant for his breach of contract.

ACTION for breach of contract tried before Denman, J., without a jury.

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Jelf, Q.C., and *Ruegg*, for the plaintiffs.

McIntyre, Q.C., and *J. L. Walton*, for the defendant.

The pleadings, facts, and arguments appear in the judgment.

Dec. 12. DENMAN, J. The statement of claim in this case alleged "that the plaintiffs had suffered damage by breach of a contract with the defendant to erect a proper and safe boat-staging at 50, Gresham Street, for the use of the plaintiffs and their workmen; that the staging was not erected by the defendant safely or properly, and in consequence gave way, injuring one of the plaintiffs' workmen, who thereupon sued the plaintiffs under the Employers' Liability Act, 1880, and the plaintiffs were adjudged to pay, and have paid him, 156*l.* 7*s.* 8*d.* for damages and costs. In the alternative, that the defendant or his servants were guilty of negligence in the selection of the materials used for the boat-staging and in the erection of the same, whereby the plaintiffs suffered the damage aforesaid."

The facts were as follows:—

The plaintiffs were builders, carrying on business in Norton Folgate. They had taken a contract to paint the outside of a house, No. 50, Gresham Street. On Saturday, the 18th of August, 1883, the plaintiffs sent one of their painters with a card to the defendant, with their name and business-address on the face of it, and on the back the words "50, Gresham Street, City, two or three boats to be fixed at the above address." Boat-staging is an apparatus used for raising and lowering workmen engaged upon work on the outside of a house. It consists of a sort of fenced narrow oblong platform called the boat, attached at the narrow ends to ropes which are attached to pulleys suspended by hooks inserted into ropes which are passed round the end of a beam over each end of the boat. These beams are called cantilevers. Each of these cantilevers ought to be firmly fixed, so as to project beyond and above the face of the wall of the house, and to allow the boat to be raised and lowered with the workmen upon it. The cantilevers are usually fixed as follows:—An upright prop is placed in the gutter of the house behind the parapet in front of the roof of the house, and on this the cantilever rests. The cantilever is made long enough to rest again upon the ridge of

the roof, and to reach beyond the ridge of the roof at its opposite end. A rope is tied round that end, and passed through one of the slates of the roof removed for the purpose by a workman called a ripper, and then tied to one of the rafters of the roof on that side of the roof which is away from the end of the lever to which the boat is attached. This is the usual practice; but in the present case, when the defendant received the card from the plaintiffs, he instructed his men who were to fix the boat not only to tie the extreme end of the cantilever to the rafter, employing a ripper to remove the slates as above described, but also to screw into the longitudinal beam which ran along under the ridge of the roof a large ring with a screw at its bottom, called a "screw eye," so that a rope might be attached to it as well as the rope attached to the further end of the lever, and being lashed round the lever at that point give additional security. The distance from the ridge of the roof to the end of the beam was from 4 to 5 feet. The defendant's men came on Monday, the 20th of August, to fix the boat-staging, and the defendant himself was present during a part of the operations. From some unexplained cause they omitted to tie the end of the cantilever to the rafter, as described to be the usual practice, or to fix that end of the cantilever at all; and instead of driving the screw of the "screw-eye" perpendicularly down into the beam under the ridge of the roof, they drove it in in a slanting direction, so that it had a very small hold. The defective screwing of the screw-eye could only have been discovered by going inside the cock-loft of the roof; but the absence of any rope at the end of the cantilever might have been observed by anyone going along the gutter of the roof, and was observed by a witness who was at the time in the plaintiffs' employ, but he was not a person entrusted with the duty of seeing that the things in question were in proper condition. The plaintiffs' men came to work on the boat-staging on the following day, Tuesday, the 21st, and at 3 P.M. on that day a man named Chalkley, being on the boat with one Holmes, who was foreman of the painters, but had nothing to do with fixing the boat-staging, the screw-eye was torn out of the beam; the cantilever fell into the street; that end of the boat which was suspended from it went down, and the boat hung by the other end, and Chalkley

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was thrown out, and injured so as to be in the hospital for several weeks. The plaintiffs were not aware of the mode in which the staging was fixed until after the accident, nor was there any evidence that their foreman or any of their men knew the exact way in which the work was done. If the "screw-eye" had been properly screwed in, I do not find that it would have been an insecure mode of fixing the boat-staging, but if the end of the cantilever had been tied to the rafter, there can be no doubt it would have added greatly to the security of the boat. On the 20th of February, 1884, Chalkley issued a summons under the Employers' Liability Act against the plaintiffs claiming 300*l.*, and in his particulars of demand he stated his claim as follows: "For injuries which were sustained while in your employ engaged as a painter, in consequence of the defective, improper, and insecure state and condition of the machinery, plant, and fittings then in use by you at 50, Gresham Street, and were caused by such defective, improper, and unfit state and condition of a certain article used in your trade by the painters called a boat, giving way, which defect was not discovered or remedied by you, the said defendants, or your foreman and servants and other persons then in your employ and service, and intrusted by you with the duty of seeing that the works, machinery, plant, and fittings at the place aforesaid were in a proper state and condition, such persons having superintendence intrusted to them by you; whereby the fastening of the said boat gave way, and the boat fell at one end and threw the plaintiff over, and caused the injuries above described." The case was about to come on for trial in the county court on the 28th of March, when the plaintiffs, having consulted their solicitors, determined to settle the matter on the best terms they could, and paid Chalkley 125*l.*, which sum was repaid to them by the Builders' Accident Insurance Company, and the plaintiffs brought the present action through the solicitor of the company, and with an indemnity from them.

Upon the above state of facts it was contended for the defendant that he was not liable; or, if liable at all, only for nominal damages—With regard to the former contention I think it clear that the defendant is liable in this action of contract. He undertook to fix the boat-staging in question—even if those words

themselves did not impute so much, I should hold in accordance with the case of *Francis* v. *Cockrell* (1), that, looking at the nature of the thing contracted for and the use to which it was to be put, there was an implied contract on the part of the defendant so to erect the boat-staging as to be reasonably fit to be used for the purpose for which it was being used when the accident took place, which in my opinion he failed to do. But I am further of opinion that the very word "fix" as applied to the subject-matter of this contract means "safely fix," and that the contract was clearly broken in either view of the contract.

But upon the question of damages I have come to the conclusion that the plaintiffs are not entitled to recover those with which they seek to fix the defendant in this action, and that, in the absence of any proof that the plaintiffs in fact sustained any damage properly attributable to the breach of the defendant's contract, all they can recover in this action is nominal damages.

It was contended for the plaintiffs that they were entitled to recover the amount paid to Chalkley to settle the action brought by him, because, looking at the probability that a jury might have found a verdict for a larger amount, it was prudent and reasonable to settle that action for the 125*l.* paid. I am of opinion that they are not so entitled for several reasons. In the first place I think it is quite clear that the plaintiffs have no right to claim such damages against the defendant, unless upon the real facts which occurred there is reasonable evidence upon which I could hold that they had incurred any liability to Chalkley to compensate him for the injuries he received by reason of the fall of the boat in which he was working. They could not be liable to Chalkley unless by the contract with him, or by reason of the neglect of some duty which they owed to Chalkley, the injuries of the latter were matter of compensation in the action which he settled.

Without laying too much stress on the particulars given in the action in the county court I think it clear that the plaintiffs were not upon the facts now proved liable in that action. If their liability is based upon contract, all that it could properly be contended that they contracted with Chalkley to do, was to take

(1) Law Rep. 5 Q. B. 501.

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reasonable and proper care that the boat-staging to be provided for the work should be properly and securely fixed. I think it would be unreasonable to hold that it was their duty under such a contract either themselves to inspect such work, or to employ any one specially to inspect it. They had, only a day before it was to be used, employed a competent contractor to fix it; and I cannot upon the evidence find anything which would justify me, as a judge of the facts, in this case to find otherwise than that the plaintiffs did take such reasonable and proper care.

There are cases no doubt in which a master has been held liable in an action for negligence for not seeing to the condition of plant or machinery which has been erected for a long time and gone to decay, but no such case is suggested here; nor can it be suggested that there was any reason for the plaintiffs suspecting that the defendant's workmen would do the work in the manner which caused the injuries to Chalkley, or otherwise than efficiently.

The action in the county court was mainly founded upon a supposed neglect of the plaintiff or his foreman or servants in not discovering or remedying the improper condition of the boat-staging.

This was the ground on which Mr. Jelf relied in his opening. Indeed without such negligence it is plain that the action in the county court must have failed, for by sub-s. 1 of s. 2 of the Employers' Liability Act, 43 & 44 Vict. c. 42, it is provided that a workman shall not be entitled to compensation or remedy against his employers under sub-s. 1 of s. 1 (which alone gives the remedy against the master for injury caused by defect in the condition of machinery or plant) unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or some one in his service and intrusted by him with the duty of seeing that the machinery and plant were in proper condition. I cannot find in the present case as a fact that there was any negligence of the kind required by sub-s. 1 of s. 2. Nor, if this had been a case tried by a jury, do I think that it ought even to have been left to a jury.

The case does not, in my opinion, fall within the authority of those cases in which the control of the work has been held to be retained by the person who employs a contractor; nor of those

cases in which the contractor is employed to do an unlawful or improper thing; nor of those cases, such as *Tarry* v. *Ashton* (1), where it was held that there was a duty to keep property in repair where, without being so kept, it would be likely to become dangerous, but rather within the authority of such cases as *Butler* v. *Hunter* (2), which held that where a contractor is employed to do a thing capable of being done properly and carefully, it must be presumed that he is employed to do it in that manner, or of *Wilson* v. *Merry* (3), per Lord Cairns, L.C. (4): "The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work." . . . "But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do." This being so, I think that the plaintiffs have no right to fix the defendant with the amount paid by them to Chalkley as damages naturally or necessarily flowing from the defendant's breach of contract, but that they paid them under a mistaken belief of their own liability; the real damages to the plaintiffs of the defendant's breach of his contract to fix would have been any loss the plaintiffs might have suffered by the delay thereby caused in the performance of their contract, or by the loss of their man's services, or such like matters. No evidence of any such consequences was, or probably could have been, given. It was further argued for the defendant, that even supposing there was negligence in the plaintiffs for which Chalkley had a right to sue them and did sue them, the plaintiffs could not sue the defend-

(1) 1 Q. B. D. 314.
(2) 7 H. & N. 826; S. C. 31 L. J. (Ex.) 214.
(3) Law Rep. 1 H. L., Sc. 326.
(4) At p. 332.

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ant for the damages in question, because they would not have been directly due to the defendant's negligence (for which the defendant might still be liable to the plaintiffs' workman), but to the plaintiffs' own independent and subsequent neglect. I am by no means prepared to say that this would not also be a fatal objection to the plaintiffs' contention in this case as regards the damages sought to be recovered. The point is discussed in the 3rd edition of Messrs. Roberts and Wallace's valuable work on the Liability of Employers, p. 471, and a Scotch case of *Ovington* v. *McVicar* (1) is cited in the note as supporting the view that the damages in such a case be too remote. But inasmuch as I am strongly of opinion that upon the facts of the present case there was no liability to Chalkley on the part of the plaintiffs, because there was no negligence in the plaintiffs for which Chalkley had a right of action against them, it is unnecessary to give any opinion upon that view of the case. I cannot hold, for the reasons I have given, that the money the plaintiffs paid to settle Chalkley's action is recoverable in the present action as damages; and no other damages being suggested or proved, but the contract having, in my opinion, been clearly broken, I give judgment for the plaintiffs for nominal damages, without costs.

Judgment accordingly.

Solicitors for plaintiffs: *Mackrell, Maton, & Godlee.*
Solicitors for defendant: *Fowler & Perks.*

(1) 2 Macph. 1066.

J. R.

[IN THE COURT OF APPEAL.]

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Dec. 17, 18;
Feb. 1.

WHITHAM *v.* KERSHAW.

Damages—Measure of—Landlord and Tenant—Action for Waste by Reversioner against Tenant.

A covenant by a tenant not to commit waste on the demised property is not with regard to the measure of damages for the breach of it the same thing as a covenant to deliver up the property at the end of the term in the same state as that in which the tenant received it.

Therefore, in an action by the reversioner against the tenant for waste, the measure of damages is not necessarily the sum which it would cost to restore the property to its condition before the waste; the true measure of damages is the diminution in the value of the reversion, less a discount for immediate payment.

APPEAL by the defendants from the judgment of Mathew, J., at the trial of the action, giving the plaintiffs 60*l.* damages and costs.

The defendants were the owners in fee of an allotment of moorland, situate at Blackmoor, near Bradford. The plaintiffs were the owners in fee of an adjoining allotment, subject to a lease thereof to the defendants for a term of fourteen years from the 7th of May, 1879. Both the allotments consisted of very poor land, there being only a slight depth of earth lying upon rock. The defendants had removed a large quantity of earth from the surface of the plaintiffs' allotment, and had placed it on their own allotment. The action was brought to recover damages for this act of waste. The action was tried before Mathew, J., without a jury, at Leeds, on the 30th of April, 1885. He held that the proper measure of damages was the sum which it would cost the plaintiffs to replace the soil which the defendants had removed. He held on the evidence that the defendants had removed 600 cartloads of soil, and that it would cost 2*s.* 6*d.* per load to replace the soil. This made 75*l.*, and he deducted a discount of 15*l.* in respect of the time which would elapse before the reversion would fall into possession. There was evidence that the land when in cultivation would be worth from 30*l.* to 35*l.* per acre, and that it would cost from 10*l.* to 15*l.* per acre to bring it into cultivation. The defendants had removed the surface from a quarter of an acre altogether.

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Dec. 17, 18, 1885. *A. Charles, Q.C., Forbes, Q.C.*, and *Spokes*, for the appellants. The judgment should have been given for the defendants, or, if for the plaintiff, then for only nominal damages. The learned judge took into consideration the expense of restoring that which the defendants had taken away from the land. That, according to *Jones* v. *Gooday* (1) and *Wigsell* v. *School for Indigent Blind* (2), is not the principle on which the damages should be estimated. The proper measure of damages is the actual injury to the reversion. "The proper measure," said Parke, B., in delivering the judgment of the Court in *Hosking* v. *Phillips* (3), "is by how much less the premises would sell in consequence of the wrongful act of the defendant." And in Mayne on Damages, 3rd ed., p. 36, it is stated that "any species of aggravation will of course give ground for additional damages. In general, however, injuries to property, when unattended by circumstances of this sort, and especially when they take place under a fancied right, are only visited with damages proportioned to the actual pecuniary loss sustained."

This is not a case for giving vindictive or sentimental damages. The true test is that which the plaintiffs have lost, and there is no evidence that the reversion has lost anything in value. The evidence is that the land, if cultivated, would be worth 35*l.* per acre, and that it would cost from 10*l.* to 15*l.* per acre to cultivate it. *Hosking* v. *Phillips* (4) is directly in point.

Arthur Powell (*Lockwood, Q.C.*, with him), for the plaintiffs. If there has been any error, it is on the side of leniency to the defendants.

There are two cardinal principles relating to damages: (1) so far as possible the plaintiff is to be fully and fairly compensated for the wrong done to him; (2) the wrongdoer is not to be allowed to take any advantage from his wrong. If the damages are reduced, both these rules will be violated. Damages may be awarded by way of penalty or punishment against a wrongdoer. The Statute of Marlborough, 52 Hen. 3, is still in force, and it provides by s. 23 that "fermors, during their terms shall not make waste . . . of anything belonging to the tenements that they

(1) 8 M. & W. 146.
(2) 8 Q. B. D. 357.
(3) 3 Ex. 168, at p. 182.
(4) 3 Ex. 168.

have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously." The evidence shews that it would cost 3*s.* per load to bring the earth up to the moor, and, if the defendants are not compelled to pay that sum for what they have taken, they will be making a profit by means of their wrongful act. In *Hide* v. *Thornborough* (1) it was held that a defendant who, by digging on his land, had caused the plaintiff's house to fall, was liable to pay the cost of reinstating the house. *Jones* v. *Gooday* (2) applies only when the damage is done unwittingly. The present case is one of wilful tort, and the cases as to wrongful severance of coal apply: *Martin* v. *Porter* (3); *Morgan* v. *Powell.* (4)

[BOWEN, L.J. Those were cases of trespass.]

A. Charles, Q.C., in reply. The evidence does not shew that the soil had any market value on the spot, or that the defendants would have been willing to give 2*s.* 6*d.* per load for it. If the damages are excessive, there ought to be a new trial.

The parties then agreed that the Court should fix the amount of damage, if it should come to the conclusion that the judge was in error.

Cur. adv. vult.

Feb. 1, 1886. LORD ESHER, M.R. This is an action by a landlord in respect of waste committed by his tenant, and it has given rise to a point of law which I have found it rather difficult to determine. [His Lordship stated the facts, and continued:—] At the trial evidence was given of what it would cost to replace on the plaintiff's land as much valuable earth as the defendant had taken away. The judge arrived at the amount of damages in this way: Supposing the land to remain in the condition in which the defendant had wrongfully put it up to the end of the lease, it will be worth nothing, unless the plaintiff restores it to

(1) 2 C. & K. 250.
(2) 8 M. & W. 146.
(3) 5 M. & W. 351.
(4) 3 Q. B. 278.

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the state in which it was before the removal. The plaintiff cannot go on to the defendant's land in order to do this, because he would be a trespasser there. He must go elsewhere to get the earth, and it would cost a considerable sum to bring the earth up to the land, which is on the top of a hill. Having arrived at the sum which it would cost to do this, the learned judge deducted a discount for immediate payment, and gave the plaintiff 60*l.* damages. The question is whether that is the right mode of measuring the damages in an action of waste by a landlord against his tenant. I confess that at first I was inclined to think that the learned judge had adopted the right measure of damages, but upon further consideration I have come to the conclusion that he has made a mistake. I think the mistake is this—he has treated the implied covenant in the lease not to commit waste as equivalent to, and producing the same result as, a covenant to deliver up the demised property at the end of the term in the same condition as that in which the tenant received it. There is an implied covenant on the part of the tenant not to commit waste, but that is a covenant not to do any act of such a permanent nature as will affect the value of the property. Besides the difference of the time at which the action may be brought, there is a great difference as to the measure of damages between such a covenant and a covenant to restore the property to the same condition as that in which the tenant originally received it. The landlord might have a favourite house on the property which was of great value to him, as a matter of sentiment, though it might not add anything to the pecuniary value of the property. If the house was allowed by the tenant to go to ruin, it would not follow that the landlord's reversion would be injured to the extent of the cost of restoring the house to its original condition. The value of the reversion might be diminished, but the question of how much injured would be a question of value, and the proper way to ascertain the damages would be to ask skilled valuers to say how much the property has been diminished in value. It would be wrong to say that the reversionary value had necessarily been diminished by the cost of restoring the property to its original condition. Whereas in the like case, if there were a covenant to leave the premises in

the same condition as when taken, the damages in an action which could only be brought after the termination of the lease would obviously be the cost of replacing the house by a house of equal value. I think, therefore, that the learned judge adopted a wrong mode of estimating the damages. The parties have agreed that we shall now decide the amount of damages, and we think that it ought to be 10*l*. With regard to the costs, we think that the removal of the soil was a very monstrous act on the part of the defendant, and, therefore, we give the plaintiff the costs of the action on the High Court scale, but we think that no costs of the appeal ought to be allowed.

COTTON, L.J. I agree in thinking that a wrong test of the damages was adopted by the learned judge. The action is brought by reversioners in respect of an injury done to the demised property by the wrongful act of the tenants. It is true that in some cases the utmost limit of the damages may be the cost (subject to a discount for immediate payment) of putting an end to the effect of the wrongful act, that is, the cost of replacing what has been taken away, or putting the property in the same condition in which it was at first. That, however, is only an utmost limit of the damages. But it does not follow that the plaintiff is in every case absolutely entitled to that amount. The question is, what injury he has sustained. The judge has taken the injury to be the cost of bringing back the earth which the defendants have taken away. Even if the action has been brought to compel the defendants to account for the earth which they have taken away, I should have thought this estimate wrong, because there was no evidence that the earth was, at the place where the land was situated, worth that sum, or that any one would have thought it worth while to bring back the earth at that cost. The parties have very reasonably left it to us to determine the amount of the damages. It appears that the whole of the soil taken away would only cover a quarter of an acre, and that the value of the land if it was in cultivation would only be about 30*l*. an acre. I think, therefore, we may properly give the plaintiffs 10*l*.

BOWEN, L.J. I am of the same opinion. If the action is regarded as an action of waste—brought, during the continuance

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of the term, for the injury done to the interest in the premises of the person who is entitled, not to the possession, but to the reversion—the true measure of damages is the injury done to the value of the reversion. If, on the other hand, the action is considered as brought for the wrongful conversion of the earth—which, the moment it was detached from the freehold, became upon severance a chattel, belonging in law to the reversioner—in this view the proper measure of the damages would be the value of the severed article at the time of severance. Whichever way you regard it, I think the learned judge has adopted a wrong measure of the damages. If the action is regarded as an action of waste, the injury to the reversion is but slight. If it is regarded as an action for the wrongful conversion, the value of the chattel when severed could not properly be assessed at anything like the sum at which Mathew, J., has assessed it. But I wish to add that nothing we have said must be understood as in any way derogating from the principle that, when a wrongful act is done by a trespasser, or by a tenant to the property of his reversioner, under circumstances which call for vindictive damages, the jury may give vindictive damages. There is, however, nothing of that kind in the present case.

Solicitors for appellants: *Radford & Frankland, agents for Spencer & Clarkson, Keighley.*

Solicitors for respondents: *Bolton, Robbins, Busk, & Co., agents for Morgan & Morgan, Bradford.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Dec. 7.

STEWART & CO. *v.* MERCHANTS MARINE INSURANCE CO., LIMITED.

Insurance (Marine)—Memorandum against Average under 3 per cent.—Adding distinct successive Losses together—Time Policy — Separate and distinct Voyages.

A time policy upon ship and freight contained the warranty "free from average under 3 per cent. unless general, or the ship be stranded, sunk, or burnt":—

Held, reversing the Queen's Bench Division, that distinct and separate average losses occurring during the same voyage could be added together so as to ascertain whether the aggregate loss exceeded the limit of 3 per cent., but not such losses occurring in more than one voyage.

Blackett v. *Royal Exchange Assurance Co.* (2 C. & J. 244) distinguished.

APPEAL from the judgment of Stephen, J., reported (1).

The pleadings are set out in the report of the case in the Court below.

The statement of claim alleged that the plaintiffs effected an insurance with the defendants on the steamer Wyndcliffe for twelve calendar months, from the 11th of January, 1882, to the 11th of January, 1883, and claimed to recover for a partial loss. The defence stated that the policy contained the warranty. "The ship and freight shall be and are warranted free from average under 3 per cent. unless general, or the ship be stranded, sunk, or burnt;" that the loss was not general average, and the vessel was not stranded, &c., and that no particular average loss amounting to or exceeding 3 per cent. occurred during any one voyage in the period covered by the policy, and that the loss for which the action was brought was the aggregate of several distinct particular average losses to the ship, each of which occurred during a separate and distinct voyage, and each of which amounted to less than 3 per cent. on the sum insured, though the aggregate amount of the losses exceeded 3 per cent. The reply substantially admitted the defence. The case was argued before Stephen, J., on the pleadings, and the learned judge gave judgment for the plaintiff.

The defendants appealed.

(1) 14 Q. B. D. 555.

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Barnes, for the defendants. The average referred to in the memorandum "warranted free from average under 3 per cent. must be taken to mean one single average loss, or at any rate average losses occurring during some distinct and separate voyage. It does not include the aggregate losses incurred in all voyages during the whole time covered by the insurance. *Blackett* v. *Royal Exchange Assurance Co.* (1), where in the case of a voyage policy it was held that several losses might be added together to make up the 3 per cent., is relied on by the plaintiffs, but it cannot on principle be supported. It proceeds upon technical rules of construction without endeavouring to ascertain the limitation put by merchants on the term "average." Any observation as to the difficulty of adjusting separate average losses before the expiration of the term of insurance does not apply where the term includes several distinct voyages. The presumption is, that an average loss is to be settled as soon as possible after it has occurred. Average is a particular loss or damage occurring at a particular time, and may be recovered when it occurs, even though there is a subsequent total loss: *Lewis* v. *Rucker* (2); *Lidgett* v. *Secretan.* (3)

Secondly, assuming that the Court is not disposed to question *Blackett* v. *Royal Exchange Assurance Co.* (1), the policy may be regarded as embodying voyage policies applicable to each voyage made during the period insured. In the case of a time policy the average is adjusted at the end of each particular voyage, and it is difficult to suppose that any other practice is possible. *Donnell* v. *Columb. Insurance Co.* (4) was the case of a voyage policy. He cited *Kidston* v. *Empire Insurance Co.* (5); *Brooks* v. *Oriental Insurance Co.* (6); Phillips on Insurance, s. 1780.

Hilbery, for the plaintiffs. No evidence of usage as to the time of adjusting average is before the Court; the case must turn on the words of the policy, and is practically concluded by *Blackett* v. *Royal Exchange Assurance Co.* (1) This decision has been unquestioned for a period of fifty years, and a contract must be taken to be made with reference to the existing law.

(1) 2 C. & J. 244.
(2) Tudor's Merc. Cas. 3rd ed. 225.
(3) Law Rep. 6 C. P. 616.
(4) 2 Sumn. 366.
(5) Law Rep. 1 C. P. 535.
(6) 7 Pick. (Mass.) Rep. 259.

It is true that *Blackett* v. *Royal Exchange Assurance Co.* (1) was the case of a voyage policy, but as a voyage may last for more than a year, the principle of the decision is applicable to a time policy. The defendants' construction introduces the words "in any voyage," or "in any one voyage," after "warranted free from average."

He cited *Dudgeon* v. *Pembroke* (2); *Robertson* v. *French* (3).

Barnes, in reply.

Cur. adv. vult.

Dec. 7. The judgment of the Court (Lord Esher, M.R., Cotton, and Lindley, L.JJ.) was delivered as follows:—

LORD ESHER, M.R. I have the permission of my Brothers Cotton and Lindley to deliver the judgment of the Court. The appeal is from the judgment of Stephen, J., who gave his decision upon the pleadings. I am sorry, for my own part, that the case was not tried before a mercantile jury, who might have been of great assistance in the matter. It raises a question which, strange to say, has never been fully decided in this country.

The action is by a shipowner upon a policy upon ship; a time policy; and it is admitted that during the period insured the ship had made several separate and distinct voyages—not one voyage with stops and rests in it—but several separate and distinct voyages, and that three or more average losses had been incurred, but not in one separate voyage; that the average losses in each voyage added together would not amount to 3 per cent., but that those in all the voyages exceeded 3 per cent. The action is to recover the amount of all the average losses. The policy is carelessly framed. It is the ordinary form of a policy on goods to which stipulations have been added so as to make it a policy on the ship only, but much is left which cannot apply to a policy on a ship, and in the memorandum which we have to construe all the provisions with regard to corn, fish, salt, fruit, &c., which have nothing to do with an insurance of the ship, are left in. The first question is, how are we to deal with such a policy? Our opinion is that as it is a policy on the ship we

(1) 2 C. & J. 244. (2) 2 App. Cas. 284.

(3) 4 East, 130.

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must strike out all the immaterial stipulations which cannot possibly apply to an assurance of the ship and begin by reading the policy as if the warranty in the memorandum were as follows—"The ship shall be warranted free from average under 3 per cent. unless general, or the ship be stranded, sunk, or burnt." Then the question is whether, in considering what has happened, all the average losses on these separate voyages should be added together, because, if so, there has been an average of over 3 per cent., or whether each average loss or those occurring on each distinct voyage, is or are to be dealt with separately, and then each average loss, or those on each distinct and separate voyage, being under 3 per cent. nothing can be recovered in respect of any one of them. Some matters must be regarded as settled. With regard to policies on goods, which are almost universally voyage policies, but which might also, so far as I know, be framed as time policies just as well as policies on ship —although it would be necessary that they should cover any goods which were at the time of the loss on board the ship—the practice has been that separate average losses, though they are quite distinct, yet if they occur on the same voyage are to be added together to see whether the aggregate amount exceeds 3 per cent. This has been decided in America in the case of a voyage policy on goods. In *Blackett* v. *Royal Exchange Assurance Co.* (1) the same decision was given in England in the case of a voyage policy on ship. In America, to which we naturally look for assistance, though not for authority—on any important mercantile question which has not yet been decided in England—the point with regard to the ship was in one case, that of a time policy, decided in a wholly different way, and in another case, that of a voyage policy, it was decided in the same way as where there were voyage policies on goods. It remains for us to determine the point in the case of a time policy on ship.

In the first place I ought to observe that in England time policies cannot now be made for a longer period than a year, but when the memorandum against average was first introduced there was no such limitation, and a time policy might have been made for several years, and I have no doubt that before 1795 it was a

(1) 2 C. & J. 244.

common practice to make such policies. In 1795, for revenue reasons only, there was an enactment that any time policy for a longer period than twelve months should be void. But if stamp duties on policies were abolished this enactment would disappear, and there might be, as there were before it, and as there are in almost every other country, time policies for more than a year. If then we consider a time policy on goods, it seems almost impossible to suppose that either party could have intended as a matter of business that these small average losses should stand over till the end of the time insured. If the time policy were for a year, there might be, as in this case there have been, separate voyages—if the time policy lasts for more than a year, there will inevitably be separate voyages, and, what is more, in all probability with a new captain and a new crew. If, therefore, in a long time policy to cover goods it were necessary for the assured to prove at the end of the period all the separate losses, and, as is only just, the insurers ought to have an opportunity of inquiring into all the circumstances of each separate loss, it would be practically impossible that the thing could be done, at all events on the part of the insurers, because if at the end of two or three years they had to inquire whether or not an alleged loss at the beginning of the period had taken place by sea perils or otherwise, or as to the amount of it, they would have to search over the world to find the crew or the captain who was then in command of the ship, and they would practically have no means of checking the matter, and although each voyage would be at an end, they would nevertheless have to wait till the end of the whole period to see whether some further loss arose.

There is also another matter to be considered. These average losses are compared with general average losses, so much so that the warranty would include general average unless it were expressly excepted. Now it is impossible to suppose that general average can be adjusted and settled otherwise than at the end of each voyage; if you were obliged to wait till the end of the period insured it would be necessary to consider the adjustments between different parties and without proper means of inquiry. Therefore in the case of a time policy on goods there would be invincible difficulty in saying that the assured must wait till the end of the

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time before adding the average losses together. It has certainly been the practice in the case of a voyage policy on goods for different losses to be added together. How should this practice be applied to a time policy, perhaps a long one, upon goods? One would think it would be applied in this manner. Add together all the losses within each separate and distinct voyage, but do not add the losses in two separate and distinct voyages. Let us consider whether the same reason exists in the case of a policy on ship? Various reasons have been given in the books for the origin of this memorandum against average. In some places it is said that the reason why these small average losses were excepted, was the difficulty of deciding how much was due to a loss by sea perils and how much to wear and tear. In the case of goods I think this is not a very good reason, for where they are easily damaged or perishable, like corn, flour or sugar, what is the wear and tear? The damage which they sustain during the voyage is almost always from sea perils, and if the beginning of the damage is from sea perils, the extent of it does not prevent it from being an average loss over or under 3 per cent. The true reason was, I think, that to prevent constant disputes about small and trifling matters, the parties agreed that such small matters should be excluded from the policy. If this were the reason for the memorandum, it is just as much applicable to the ship as to the cargo.

Questions of wear and tear or damage from sea perils are no doubt more easily decided in the case of the ship than of the goods. But with regard to a great many injuries to the ship it is just as difficult to say when the whole injury took place. If one injury is the loss of her topmast and the other the blowing away of her sail in a different storm it is very easy to distinguish between them, but in the case of other damages, as when the ship is strained in a storm, and in the same voyage there is another storm, it would be difficult to say whether there was a new strain whether in the same or in a different part of the ship, or a further strain beyond what occurred in the first storm. So that I think the difficulties with regard to wear and tear and damage from sea perils arise in the case of ship as well as in the case of goods, and that the memorandum was adopted to avoid trifling

disputes. In old times I have no doubt that the 3 per cent. was a very fair amount to cover these small losses. Ships were much smaller than they are now, and their value was less, but their size and value have now increased to such a degree that 3 per cent., as compared with the value of the ship, will cover very considerable losses, but merchants and insurers, with that indolence which belongs to mercantile transactions, have not taken the trouble to alter the rate of percentage, and part of the argument in this case was that in the case of a valuable ship even less than 3 per cent. may represent a considerable sum. But this fact cannot alter the construction of the memorandum which must be construed in the same way as when it was first introduced, and when there was not the same limitation in the case of time policies as there is now. The first case to be dealt with is the American case of *Brooks* v. *Oriental Insurance Co.* (1). It came before a judge whose decisions I have often read with admiration, and from whom I have certainly received great assistance, Mr. Justice Putnam. It was a time policy on ship, there were successive losses, and the second question was "are distinct successive losses to be added together to make up the 5 per cent." The judgment is, "we are of opinion that distinct and successive losses are not to be added together in order to make up the 5 per cent., and that the damage from disasters happening at one time or in one continued gale or storm is to be considered by itself. If this were otherwise, the insurers would be called upon to pay for a great many trifling losses which should be borne by the assured, as coming within the common wear and tear of the ship."

I cannot accede to this reasoning, for one continued gale or storm may last three days and nights, and it would not be easy to say whether the losses were distinct. Suppose the ship scrapes a rock and is damaged in her keel, and, suppose that on the second or third day of that continued storm, she loses her mast, this damage would have nothing to do with the injury to her keel. The two injuries are as distinct as if they occurred in separate storms. It was argued that we ought to adopt the rule laid down in this case, and that each distinct loss must be dealt

(1) 7 Pick. (Mass.) Rep. 259.

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with by itself, though happening on the same voyage, but, as I have said, I cannot adopt the reasoning of Putnam, J.

The next case in order of time, *Blackett* v. *Royal Exchange Assurance Co.* (1), arose in this country. It came before the Court of Exchequer when Lord Lyndhurst was Chief Baron, who, great and excellent as he was in many respects, was scarcely a great mercantile lawyer. Still, the decision must be followed, especially as it was given in 1832, and has never since been overruled. It was the case of a voyage policy on the ship *Thames* "at and from London to Calcutta," with the memorandum "free from average under 3 per cent. unless general," and the Court, in a considered judgment, held that the different losses occurring during the same voyage must be added together, although they were in fact distinct losses arising from different causes. That is to say they followed the rule in a policy on ship which had been recognised with regard to policies on goods. I shall venture to criticise the judgment to this extent, that the Court do not appear to have considered the business aspect of the case. They decided upon the ordinary rule of construction applicable to other instruments —that the memorandum was in the nature of an exception—an exception in favour of the assured, and that where a stipulation or a contract is in favour of one of the parties it is to be construed most strictly against him. I shall presently give my reasons for not applying such rules to a mercantile instrument such as this, but the case is a binding authority with regard to a voyage policy.

Then we have a very elaborate judgment of Story, J., in America, in *Donnell* v. *Columb. Insurance Co.* (2) In that case the policy was on the ship, and was a voyage policy. There was a series of stoppages, but the voyage insured was from Baltimore to ports in succession, and thence to a port of discharge in Europe or the United States. Story, J., came to the conclusion that the losses must be added together to see whether they came within the memorandum. He gives another rule of construction, which if one were to apply it to this policy might carry the decision one way. He says this memorandum is an exception from a loss which is applicable to the whole voyage, and he says it is a

(1) 2 C. & J. 244. (2) 2 Sumn. 366.

rule of construction that the exception must be applied to the same subject-matter as that from which it is excepted. It will be seen that the case is one of a voyage policy on ship, and therefore what it really decides is that losses on the same voyage are to be added together. So that it agrees with *Blackett* v. *Royal Exchange Assurance Co.* (1) and differs from *Brooks* v. *Oriental Insurance Co.* (2) There are, therefore, two instances, one in England and one in America, which decide that where the policy is a voyage policy on ship the losses must be added together, and they are opposed to the view taken in the other American case that each loss in the same voyage is to be considered by itself. So far as a voyage policy is concerned I think these two decisions must be followed.

But ought we in the case of an instrument like an English policy of insurance or a charterparty to apply the rules of construction which are applicable to other instruments? Anything more informal, inartistic, or ungrammatical than those policies or charterparties cannot be found, and until recently whenever a point arose as to their meaning our judges almost invariably took the opinion of a jury upon the question. They did not merely take evidence of custom, they asked juries what their view of the contract was, and I myself should have been prepared to take the opinion of a jury on this point as a matter of business. It is said that there is this difficulty, that it would be necessary to take the evidence of average adjusters, and that these adjusters have proclaimed that they do not act upon any custom of merchants, but that they endeavour to follow the law. But I should have suggested that merchants should also be called as witnesses, and that the jury should decide after having heard the whole evidence. I protest against the attempt to construe these policies by the rules of construction applicable to other instruments, and where they are construed without the assistance of a jury I think the proper way is to consider them with the aid of our knowledge of business, and to take it for granted that merchants and insurers have acted in a businesslike way. When a time policy is considered according to this principle, and having regard to what I have said as to the limitation

(1) 2 C. & J. 244. (2) 7 Pick. (Mass.) Rep. 259.

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of time being established for revenue purposes only—taking into account the fact that a great number of ships are insured by time policies because the different voyages are short and there are many voyages in the year—it seems to me that we ought to conclude that the merchants and insurers did not intend to wait till the end of the time insured before they began to add up the losses to see whether they were under 3 per cent. If the voyage were short, as in the case of coasting vessels and otherwise, the crew would be changed at the end of each voyage, and the captain might be changed, and if they have to settle general average losses they ought to settle them at the end of each voyage. In the case of damage to the ship, such as a loss of spars or sails, or any small injury to the steering gear, it must be repaired at the end of the voyage, or the ship would be unseaworthy at the beginning of a new voyage. The end of the voyage seems to me the natural business moment for the consideration of these losses, and I have come to the conclusion that the separate and distinct voyage is the period which is to be considered for this purpose. In the case of a voyage policy it is the whole period covered by the policy. In the case of a time policy it is each separate and distinct voyage. I do not deal with voyages which are divided into stages.

I may add, that Phillips on Insurance (a book in which one would always look for a careful and guarded statement of the law) does not deal with precisely the same point as this. But in s. 1780, we read, "Another question is whether successive losses can be added together and a claim made, if the aggregate exceeds the rate of the exception." He makes no distinction between ship and goods. Then he says, "In regard to the cargo and freight (leaving out the ship) the practice in adjustments has always been to estimate the rate of the exception upon the aggregate loss"—of what?—"of each passage or period during which the risk continues on the same subject." If the author had in his mind the possibility of a time policy covering different goods in different voyages, his words would exactly apply to the case. In the case of a time policy on the ship, the words "each passage or period," to my mind refer to each separate and distinct voyage, so that you must add together the

average losses which occur on a separate and distinct voyage, and if they exceed 3 per cent. the case is taken out of the exception. But you must not add together the losses which occur in two distinct voyages.

There is one case in which the whole voyage cannot be brought in, that is if the last voyage lasts longer than the time insured, for in a time policy the time might end in the middle of the last voyage. This is a case which is not provided for by the policy, but it makes no difference in the point of view which I take. The losses in this case being losses in separate and distinct voyages, and the losses on any one voyage not amounting to 3 per cent., though if added together they exceed 3 per cent., we must disagree with the judgment of Stephen, J., and say that this appeal must be allowed.

Appeal allowed; judgment reversed.

Solicitors for plaintiffs: *F. W. & H. Hilbery.*
Solicitors for defendants: *Waltons, Bubb, & Co.*

A. P. S.

PANDORF & CO. *v.* HAMILTON, FRASER, & CO.

Dec. 19, 21.

Ship—Charterparty—Bill of Lading—"Dangers and Accidents of the Seas"—Hole made by Rats—Damage by Sea-water—Absence of Negligence.

Damage to goods on board a ship caused by sea-water passing through a hole made by rats,—without any evidence of negligence on the part of the master or crew,—is within the ordinary exception of "dangers and accidents of the seas" in a charterparty or bill of lading.

Rice was shipped under a charterparty and bills of lading which excepted "all and every dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind." In the course of the voyage a hole was made by rats in a pipe which conveyed sea-water to a bath in the ship, whereby the water escaped and damaged the cargo. All reasonable precautions had been taken to keep down the rats:—

Held, that the damage was within the exception, and that the ship-owners were not responsible.

ACTION by the plaintiffs as shippers of rice for damage done to it during its carriage in the defendants' ship.

The pleadings are stated in the judgment. At the trial before Lopes, J., at Liverpool, it appeared that the plaintiffs chartered

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the defendants' ship to proceed to Akyab and there load a cargo of rice for Liverpool. The excepted perils in the charterparty were "the act of God, &c., and all and every other dangers and accidents of the seas, rivers, and steam-navigation of whatsoever nature and kind and errors of navigation during the voyage." The rice was shipped under bills of lading which contained the usual exception of "all and every dangers and accidents of the seas, rivers, and navigation, of whatsoever nature and kind." During the voyage from Akyab to Liverpool the rice was damaged to the amount of 1008*l.* 1*s.* 8*d.*, by reason of sea-water passing from a metal pipe connected with a bathroom in the vessel. This pipe had been gnawed through by rats; and it was admitted on the part of the plaintiffs that all reasonable precautions had been taken by the captain and his crew to keep down the rats on the voyage out to Akyab. For the defendants it was suggested that the rats had been brought on board by the plaintiffs in the course of shipping the rice, and that the damage was consequently due to inherent vice in the goods. The learned judge left questions to the jury which made the last point immaterial, and then reserved the case for further consideration.

Cohen, Q.C., and *Joseph Walton*, for the plaintiffs. The damage done to the cargo was not within the perils excepted in the charterparty and bills of lading. To bring the case within the exception, the defendants are bound to shew not merely that the accident was not due to their negligence, but that it was one of the perils peculiar to navigation; and damage from rats is not one of such perils. The proximate cause of the damage was not the breaking in of the sea-water, but the mischief done by the rats, against which the defendants have made no express provision. [They cited *Dale* v. *Hall* (1); *Laveroni* v. *Drury* (2); *Kay* v. *Wheeler* (3); *The Chasca* (4); *The Glenfruin* (5); *Woodley & Co.* v. *Michell & Co.* (6); Story on Bailments, § 512 *a.*]

Bigham, Q.C., and *J. G. Barnes*, for the defendants. First, the damage must be taken to have occurred by an "act of God"

(1) 1 Wils. 281.
(2) 22 L. J. (Ex.) 2; 8 Ex. 166.
(3) Law Rep. 2 C. P. 302.
(4) Law Rep. 4 A. & E. 446.
(5) 10 P. D. 103.
(6) 11 Q. B. D. 47.

within the exception in the shipping documents, for it was caused solely by the rats, which the defendants had taken every reasonable precaution to exclude from the vessel. Secondly, the defendants are within the exception of "dangers of the seas," which applies to all accidents which cannot be avoided by the exercise of human foresight. Where the negligence of some human being has contributed to the loss, the element of sea-peril is gone. But, if the element of human negligence is absent, the exception attaches; and a peril which is the effective cause of the loss is a peril of the sea: *Woodley* v. *Michell.* (1) There is no authority on the precise point before the Court, and nothing can be found bearing upon it except the dictum of Pollock, C.B., in *Laveroni* v. *Drury.* (2) The damage was done by the incursion of sea-water without any negligence on the part of the ship-owners; and this constitutes a damage by a peril of the sea. [They cited *Pickering* v. *Barclay* (3); *Buller* v. *Fisher* (4); *Siordet* v. *Hall* (5); *Devaux* v. *J'Anson* (6); *Bishop* v. *Pentland* (7); *De Rothschild* v. *Royal Mail Steam Packet Co.* (8); *Davidson* v. *Burnand* (9); Story on Bailments, § 512 *a*; Abbott on Shipping, 12th ed. p. 329.

Joseph Walton, in reply.

Cur. adv. vult.

Dec. 21, 1885. LOPES, L.J. This was an action brought by the plaintiffs, the shippers of certain rice, against the defendants, the ship-owners, to recover 1008*l.* 1*s.* 8*d.* damages for injury to the rice on a voyage from Akyab to Liverpool. It was agreed that the sum of 1008*l.* 1*s.* 8*d.* was the amount recoverable, if the defendants are liable.

The defendants in their statement of defence alleged that the damage complained of occurred by reason of perils excepted in the bills of lading. The excepted perils in the bills of lading were "all and every dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever." The defendants

(1) 11 Q. B. D. 47.
(2) 22 L. J. (Ex.) 2; 8 Ex. 166.
(3) 2 Roll. Abr. 248.
(4) 3 Esp. 67.
(5) 4 Bing. 607.
(6) 5 N. C. 519.
(7) 7 B. & C. 219; 1 M. & R. 49.
(8) 7 Ex. 734.
(9) Law Rep. 4 C. P. 117.

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also alleged that the goods were shipped under a charterparty, and that the damage complained of occurred by reason of perils excepted in such charterparty. The excepted perils in the charterparty were "the act of God and all and every other dangers and accidents of the seas, rivers, and steam-navigation, of whatever nature and kind soever, and errors of navigation during the voyage." The defendants also alleged that the damage occurred from inherent vice in the said rice, and from the improper condition in which it was shipped. They also denied an allegation made by the plaintiffs in their statement of claim, that the vessel was at the commencement of the voyage unseaworthy.

At the trial before me at Liverpool there was no dispute about the cause of the damage to the cargo; and in the course of the trial it was agreed that the damage was caused during the voyage by sea-water passing through a hole in a pipe connected with the bath-room in the vessel, such pipe being eaten through by rats. It was also agreed that all reasonable precautions had been taken to keep down the rats on the voyage to Akyab.

The inherent vice in the rice relied on by the defendants was the shipping the cargo at Akyab with rats in the bags, or bringing the rats on board in the lighters with the rice.

To dispose of this point, I left to the jury the following questions,—"Were the rats that caused the damage brought on board by the shippers in the course of shipping the rice? And, did those on board take reasonable precautions to prevent the rats coming on board during the shipping of the cargo?" The jury answered the first question in the negative, and the second in the affirmative. These answers disposed of the alleged inherent vice in the cargo upon which the defendants relied.

It may be convenient here to deal with the contention of the plaintiffs that the ship was unseaworthy at the commencement of the voyage by reason of a rat or some rats being on board. Mr. Cohen contended that the presence of a rat or some rats constituted a latent defect, and made the ship unseaworthy. It is clear from the findings of the jury, and the admission, that there was no excess of rats. If the presence of a rat or some few rats on board a wheat or rice carrying ship makes her unseaworthy,

very few such vessels, if any, would be seaworthy; for, I presume few, if any, are absolutely free from rats. I think this point is untenable.

The *immediate* cause of damage in this case was the incursion of salt-water through the hole in the pipe eaten through by the rats. The effective cause of damage was the rat or rats.

Question,—Is damage so caused "a danger or accident of the seas" within the meaning of the bills of lading and charterparty? The point is novel and important, and has been very ably argued.

A carrier by sea is, like a common carrier, apart from express contract, absolutely responsible for the goods entrusted to him, and insures them against all contingencies excepting only the act of God and the enemies of the Queen.

It was at first contended that what happened here exonerated the defendants, as amounting to damage resulting from acts of God. This point was subsequently abandoned; nor, indeed, could it be maintained in the face of the decision of *Dale* v. *Hall* (1), which appears to decide that the action of rats is not one of those natural causes which may be acts of God. Moreover, it is not pleaded in this case that the damage resulted from the act of God. "Dangers or accidents of the seas" are practically equivalent to the more popular term "perils of the seas."

In a seaworthy ship damage to goods caused by the action of the sea during transit, not attributable to the fault of anybody, is in my opinion a "danger or accident of the seas" intended to come within the exception, and exonerating the ship-owner. It is clear the action of the sea itself is one of the causes contemplated. Losses by perils which have no special connection with the sea or the navigation, though they may occur during the voyage, do not fall within this exception. For instance, damage by rats eating the cargo: *Kay* v. *Wheeler* (2); *Laveroni* v. *Drury* (3); or cockroaches eating the goods in the ship: *The Miletus* (4); or by an accidental fire in the hold: *Hong Kong, &c., Banking Co.* v. *Baker.* (5) The reason is obvious: these are all losses which are in no sense attributable to any action of the

(1) 1 Wils. 281.
(2) Law Rep. 2 C. P. 302.
(3) 8 Ex. 166; 22 L. J. (Ex.) 2.
(4) 1 Parsons on Sh. 258, n.
(5) 1 Parsons on Sh. 256.

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sea, but which might occur anywhere. The cause of loss must be such that ordinary exertions of human skill and prudence,—such exertions as might be reasonably expected from careful and prudent men,—will not avail to guard against it. A stranding due to unskilful navigation is not within the exception.

Where water got into a ship through a hole wrongfully bored in her by some of the crew and damaged the cargo, the exception "dangers of the sea" in a bill of lading was held not to protect: *The Chasca.* (1) The learned judge held that, in construing exceptions in a bill of lading, the real and not the proximate cause of loss, as in the case of marine insurance, was to be regarded. It was also held that losses occasioned by negligence not being within the exception "perils of the sea," à fortiori barratry would not be.

Where a ship was sunk and the goods lost owing to a collision with another ship, and there was no fault on the part of either ship, the loss was held to be a peril of the sea: *Buller* v. *Fisher.* (2) The case, however, which has gone furthest is *Woodley & Co.* v. *Michell & Co.* (3) There, there had been a collision, and it was held that, if there had been negligence in navigating either of the ships, the owner of the carrying ship was not protected. The negligence was not the negligence of the carrying ship, but of the other: still it was held that the owner of the carrying ship was not protected. Brett, L.J., said (4): "What I think it is necessary in this case to say (and I repeat it without any doubt) is, that, although a collision when brought about without any negligence of either vessel is, or may be, a peril of the sea, a collision brought about by the negligence of either of the vessels, so that without that negligence it could not have happened, is not a peril of the sea within the terms of that exception in a bill of lading." It seems, therefore, that directly the real or effective cause of the loss is some act of man, the loss cannot be ascribed to "dangers or accidents of the sea."

These authorities support the definition which I have given: nor do the plaintiffs seek to impugn it, so far as it goes; but they contend that a further term must be added, *e.g.* that the effective

(1) Law Rep. 4 A. & E. 446.
(2) 3 Esp. 67.
(3) 11 Q. B. D. 47.
(4) At p. 52.

cause must not only be something beyond human control, but something peculiar to navigation. They say, in fact, the rats here are the effective cause, and rats are not peculiar to navigation. In Story on Bailments, § 512 *a*, there is the following passage, which seems to be in point: "The phrase 'perils of the sea,' whether understood in its most limited sense, as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents occurring upon that element, must still in either case be understood to include such losses only to the goods on board as are of an extraordinary nature, or arise from some irresistible force, or from inevitable accident, or from some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

The point raised here is, that, though the loss is proximately and directly from dangers which are peculiarly incidents of the sea, yet another cause has co-operated without which the mischief would not have happened. In *Laveroni* v. *Drury* (1) what has happened in this case evidently occurred to the mind of Pollock, C.B. Rats had eaten the cargo; and it was held that the loss was not by a "peril of the sea." There was no incursion of sea-water: nor was there anything to connect the damage peculiarly or at all with the sea or navigation. Pollock, C.B., in his judgment (2) says: "If, indeed, the rats had made a hole in the ship through which water came in and damaged the cargo, that might very likely be a case of sea damage." This was an obiter dictum, and not necessary for the decision.

I think a loss arising from some inevitable accident at sea whereby sea-water enters the ship and damages goods, is a "danger or accident of the seas" within the exception. It seems to me that, where the effective cause is beyond human control, and in consequence salt water enters which damages goods, it is an "accident of the sea" within the meaning of the contract of affreightment and the true intention of the parties. Here, it is sea damage occurring at sea and nobody's fault. I think the defendants have brought themselves within the exception.

(1) 8 Ex. 166; 22 L. J. (Ex.) 2. (2) 22 L. J. Ex. at p. 4.

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Suppose this same pipe had burst from frost or from some cause which human care and foresight could not have prevented, and goods damaged by entry of salt water, could it be successfully contended that the ship-owners were not protected? I think not. I see no distinction between that case and the one now under discussion.

There will be judgment for the defendants, with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *W. Crump & Sons.*

J. S.

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Feb. 27.

[CROWN CASE RESERVED.]

THE QUEEN *v.* PETERS.

Criminal Law—Undischarged Bankrupt—"Obtaining credit"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 31—*Jurisdiction.*

In order to convict an undischarged bankrupt under 46 & 47 Vict. c. 52, s. 31, of the offence of "obtaining credit to the amount of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt," it is not necessary that there should be a stipulation to grant credit in the contract between the parties; it is sufficient if a credit in fact is obtained.

The prisoner, an undischarged bankrupt living in Newcastle-on-Tyne, bought a horse from the prosecutor, a farmer in Ireland, for 22*l.*, free of expenses to the vendor, who by the prisoner's direction delivered the horse on board a steamer at Larne; no stipulation was made as to the time or mode of payment, and the prisoner did not disclose the fact that he was an undischarged bankrupt. The prisoner paid for the carriage of the horse on its delivery to him at Newcastle, and immediately sold it, and refused to pay the price to the prosecutor:—

Held, by Lord Coleridge, C.J., Hawkins, Day, and Grantham, JJ.; Manisty, J., dissenting, that there was evidence to go to the jury of an obtaining of credit by the prisoner within the meaning of s. 31 of the Bankruptcy Act, 1883:—

Held, also, that the offence was committed in Newcastle-on-Tyne.

CASE stated by the Recorder of Newcastle-upon-Tyne, which is in substance as follows:—

The prisoner was tried at the Epiphany quarter sessions on an

indictment under (1) s. 31 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which charged that he, being an undischarged bankrupt, who had been adjudicated bankrupt pursuant to the Bankruptcy Act, 1883, unlawfully and with intent to defraud, did obtain credit to the extent of 20*l.* and upwards from one William Carson, of Dreen, in the county of Antrim, in Ireland, without informing the said William Carson that he, the prisoner, was an undischarged bankrupt when he so obtained credit or previously thereto.

The prisoner was adjudicated bankrupt on the 25th of February, 1884, and remained an undischarged bankrupt at the time of his trial. On the 27th of August, 1885, the prisoner wrote a letter from Newcastle to William Carson, a farmer residing in the county of Antrim, in Ireland, asking for a description of a black cob which he had heard that Carson was willing to dispose of, and inquiring what was the lowest price that Carson would take for him "put on steamer at Larne." On the 1st of September, 1885, Carson wrote from Dreen a letter in answer, giving a description of the cob, and offering to take 22*l.* for him "free of expenses from here," adding, "If you think of him, I will see him safely on the boat at Larne, and will have everything done for you as cheaply as I can." On receiving this letter the prisoner sent from Newcastle the following telegram to Carson:—"Your letter received; please send the horse to catch the steamer at Larne to-morrow afternoon by the narrow gauge Ballymena." On the 3rd of September, on the receipt of the telegram, the horse was put on board a steamer at Larne, in Ireland; it arrived at Newcastle on the 4th of September, and was on that day delivered by the railway company to the prisoner, who then paid them the charges for its carriage. The prisoner immediately afterwards sold the horse for his own benefit, and never paid the price to Carson. After waiting a few days Carson wrote to the

(1) By 46 & 47 Vict. c. 52, s. 31: "Where an undischarged bankrupt, who has been adjudged bankrupt under this Act, obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act, 1869, and the provisions of that Act shall apply to proceedings under this section."

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prisoner asking for payment, and subsequently sent a telegram to the same effect; eventually, on the 13th of October, Carson came over to England, and saw the prisoner at his house at Newcastle, and demanded payment, but the latter refused to pay, alleging no reason or excuse for non-payment, and set Carson at defiance.

On these facts it was contended, on behalf of the prisoner, that there was no evidence to go to the jury that he had obtained credit within the meaning of s. 31 of the Bankruptcy Act, 1883, and that, if he had obtained credit, such credit was not obtained within the borough of Newcastle, but outside the jurisdiction of the Court, viz. in Ireland, to which country the Act did not apply. The recorder overruled the objections, holding that there was a case for the jury. The prisoner was convicted and sentenced to four months' imprisonment, and was in prison under such sentence, being unable to find bail.

If the Court was of opinion that there was no evidence to go to the jury of an offence committed by the prisoner under s. 31 of the Bankruptcy Act, 1883, within the jurisdiction of the Recorder of Newcastle-upon-Tyne, the conviction was to be quashed.

J. Lawson Walton, for the prisoner. First, the prisoner did not obtain credit. "Obtaining credit" is the obtaining a contractual right to defer a payment due under a contract. If there is no right to defer the payment, the buyer is merely profiting by the kindness of the vendor. Locke, cited in "Johnson's Dictionary," defines credit as "nothing but the expectation of money within some limited time:" here no time was limited within which payment was to be made, and the transaction commercially defined is a cash transaction.

[HAWKINS, J. It is a credit until the vendor insists on payment: an unascertained credit, or period of credit.]

If the contention of the prosecution is sound, the offence was complete when the horse was put on board the steamer at Larne, and the words "obtain credit" must be read to mean "obtain goods without immediate payment." If there is no stipulation for credit, there is an implied stipulation that there shall be no credit. The purchaser may enjoy a credit, in fact, without "obtaining credit," under this section.

[LORD COLERIDGE, C.J. How do you distinguish this case from that of an undischarged bankrupt ordering a thousand pounds' worth of goods, and not paying for them; getting the goods without mentioning that which he knows would prevent him from getting them?]

Such a case would not be within the Act, for it is impossible to define the moment when all the materials of the offence are present.

Secondly, the recorder had no jurisdiction. The credit was obtained (if at all) in Ireland, where the horse was delivered to the carriers, who were receiving agents for the purchaser: *Reg.* v. *Jones* (1); Russell on Crimes (5th ed.), vol. ii. p. 583.

Joel, for the prosecution, was directed to confine his argument to the first point.

The parties were not ad idem until the telegram was sent by the prisoner assenting to the vendor's terms, and the contract was complete when that telegram was sent. The property in the horse passed to the prisoner, and nothing was left to the unpaid vendor but his right to stop in transitu; in the event of the prisoner's death the property in the horse would have passed to his trustee in bankruptcy: this amounted to "obtaining credit" for the value of the horse. Comparing ss. 11, 13, and 14 of the Debtors Act, 1869, with s. 31 of the Bankruptcy Act, 1883, it is clear that the last-mentioned section is not a description, but an extension, of the liability of the debtor.

J. Lawson Walton, in reply.

LORD COLERIDGE, C.J. We are all of opinion that the second point must be decided in favour of the conviction. The question is where an indictment which charges an undischarged bankrupt with having obtained credit should be tried, and we are all agreed that in the present case the credit was obtained (assuming it to have been obtained at all) in Newcastle. The prisoner lived there; he wrote to the vendor thence; he received an answer there; he ordered the horse to be sent there; he received it there. As the case does not raise the question whether, assuming the offence to have been committed in Ireland, the prisoner could

(1) 1 Den. C. C. 551.

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have been indicted in that country, we do not decide that point; but we do not say that no indictment would have lain in Ireland for the offence.

The first point is the more important one, and the case is shortly this. A trader living at Newcastle hears of a horse in Ireland, and writes to the owner asking its price; a correspondence ensues, and a contract is arrived at that the horse shall be sold for 22*l.* and forwarded to Newcastle free of expense to the vendor. It is forwarded and received by the prisoner. Nothing is said at the moment by which to ascertain the time at which payment is to be made; it is left unascertained. After some time the man in Ireland writes to the man in Newcastle to get his money; the money is not sent, but excuses are made; the seller then comes over to Newcastle and sees the prisoner, who refuses to pay. The only other fact necessary to add is that at the time of making the contract the prisoner was an undischarged bankrupt.

The question for us is whether this undischarged bankrupt did obtain credit. In the first place it is said that he did not, because there was no stipulation in the contract as to the time of payment; that that means payment at once; and that it is not fair that a cash transaction in which cash is not actually paid should be held to be within the meaning of s. 31 of the Bankruptcy Act, 1883. This is an argument which is entitled to consideration in itself, and also because it has the assent of my Brother Manisty. It is said also that s. 11 of the Debtors Act, 1869, is in favour of the prisoner, because that section contains the words "obtains any property on credit, and has not paid for the same, unless the jury is satisfied that he had no intent to defraud." The contention for the prisoner is that what is sought to be prevented by this section is not the obtaining of goods now and then, but the obtaining of a regular mercantile credit, which he may or may not use, as he thinks fit. But against that contention must be set the words themselves which are used in the section, and we must ascertain their meaning, bearing in mind that it is undesirable to take words in an Act of Parliament as being used out of their ordinary sense, unless they are clearly so intended to be taken. The words of the section are "obtains credit." Did the prisoner obtain credit? It is said that he did not, because he did

not stipulate for it; but the Act does not say that there must be a stipulation for credit, or that it must be obtained on a specific contract to give credit. In such a case as the present, where a man obtains goods and does not pay for them for a substantial period of time, I am not prepared to say that we ought to limit the plain meaning of the words in the Act of Parliament. The prisoner has obtained credit and has had it, whether or no he stipulated for it at the time of the purchase. I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books. Now in Johnson "credit" is defined as being "correlative to debt"; and in the present case the debt was created by getting the horse and not paying for it; in other words, the creditor gave credit to the debtor. Webster defines it as "trust, the transfer of goods in confidence of future payment," a definition which is strictly applicable to the present case, where the man in Ireland delivered the horse relying on the credit and probity of the buyer. The provisions of the section undoubtedly constitute a strong interference with commercial transactions, but they are limited to the case of an undischarged bankrupt, and they interfere with large transactions as well as with small ones, and in construing a general Act of Parliament its effect upon large as well as small transactions must be faced. An order might be given for substantial quantities of goods which would not be delivered if it were known that the person ordering them was an undischarged bankrupt. If it is a fair argument to say that the section interferes with small transactions, it is also fair to say that it interferes with large ones. If the section prevented an undischarged bankrupt from getting a loaf of bread or a mutton chop without explaining his position, the state of the law would be intolerable; but it is not so. It is obtaining credit under such circumstances to the extent of 20*l.* that is the offence, and if a person in the position of the prisoner obtains goods to the amount of 20*l.* on credit without saying that he is an undischarged bankrupt, he comes not only within the words but within the mischief of this Act. This man did so, and it is clear

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that he would never have got the horse had he explained his position to the prosecutor. I am of opinion that this conviction should be affirmed, and in this opinion my Brothers Hawkins, Day, and Grantham concur.

MANISTY, J. I unfeignedly regret that I am obliged to differ from the judgment of the remainder of the Court; though but for the opinion of my brother judges I should not have had a doubt upon the case. The first ground for my opinion is that the prisoner never obtained credit. He never had any, there was not a single moment when he was entitled to it. The debt became due on delivery of the horse on board the steamer at Larne, and the prisoner could have been sued for it from that moment. I entirely agree with the cardinal principle that the exact words of an Act of Parliament are to be looked at, and that they are to be construed in their natural sense unless it is clear that a limited and special meaning attaches to them; it is the application of the principle that is difficult. In this case it seems to me that the words in their ordinary sense do not express that which they are said to express, they point to a credit, as distinct from a cash, transaction; and this was a cash transaction. A comparison of the language of the section with that of s. 11 of the Debtors Act, 1869, shews what was the intention of the legislature. It was the buying of goods with the stipulation for credit that was aimed at, not the buying of goods as a cash transaction. If this were not so, what would be the consequences? If the prisoner had paid for the horse on the day of its delivery at Newcastle he would still have committed a misdemeanor. I do not believe that the legislature ever contemplated such a state of things. They might have inserted the words used in s. 11 of the Debtors Act, 1869, "unless the jury is satisfied that he had no intent to defraud;" and then the mere fact of getting the horse would have thrown on the prisoner the onus of disproving fraudulent intent. I do not think it ever entered the minds of the framers of the recent Bankruptcy Act that if a man ordered a horse for 21*l.* without disclosing the fact that he was an undischarged bankrupt, and then paid for the horse, he was guilty of a misdemeanor; or that a man in such a position should commit an offence by

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ordering goods when he has the money to pay for them and honestly intends to do so; such a consequence as this may legitimately be taken into consideration when we are construing the words of a penal section. I think the section aims at a man who enters into a "credit transaction" without disclosing the fact that he is an undischarged bankrupt, and I am therefore of opinion that this conviction should be quashed.

Conviction affirmed.

Solicitor for prisoner: *T. Cray, for Dix & Warlow, Newcastle-upon-Tyne.*

Solicitor for prosecution: *Solicitor to the Board of Trade.*

W. J. B.

[CROWN CASE RESERVED.]

Feb. 27.

THE QUEEN *v.* FLOWERS.

Criminal Law—Larceny—Delivery of Chattel under Mistake common to both Parties—Innocent Receipt by Prisoner—Subsequent Fraudulent Misappropriation.

The old rule of law that the innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny, is not affected by the decision in *Reg.* v. *Ashwell* (16 Q. B. D. 190). That case distinguished and discussed.

CASE stated by the Recorder of Leicester, of which the facts were in substance as follows:—

The prisoner, Charles Flowers, was indicted at the Epiphany sessions for the borough of Leicester for the larceny as a servant of 7*s.* 11½*d.*, the property of Samuel Lennard and another, his masters; other counts charged him with simple larceny and with receiving. He was at the time of the offence charged a clicker in the service of the prosecutors, a firm of shoe manufacturers in Leicester, and the usage with respect to the payment of wages in their establishment was as follows:—

The amount of wages due to each workman was calculated from the time book and entered in the wages book. Each amount was then made up and put into a small paper bag, which was then

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sealed, and the bags so secured were sent to the various rooms in which the men worked. The foreman of each of such rooms then distributed the bags containing the wages among the men under his charge. When a mistake occurred the workman affected thereby took his bag to Francis Cufflin (the clerk) to have the mistake rectified.

From the evidence given by the witnesses for the prosecution it appeared that on the 31st of October, 1885, the sum of 16*s.* 8*d.* was due to the prisoner for wages; a bag, which was supposed to contain that sum, was handed by the foreman of the room to the prisoner, who tore the top off the bag, and in the presence and hearing of Hillman, a fellow-workman, put the money in his pocket, remarking that he was short but would keep what he had got. On the same day, after the men had been paid, the prisoner came to Cufflin, the clerk, and handed him the torn bag, saying that he was 3*d.* short; the bag was then empty.

At the same time that the prisoner was making his complaint to Cufflin, another clicker, named Jinks, also made a complaint that his amount was 5*d.* or 6*d.* short; the sealed bag of money which had been handed to Jinks for his wages was marked on the outside "7*s.* 11½*d.*, Jinks," and he, knowing that this was less than the wages properly due to him, handed his bag to Cufflin unopened, in the same condition as that in which he had received it from the foreman; the prisoner was present when he so handed it back. Cufflin obtained from the cashier the 3*d.* by which the prisoner's wages were short, and handed that sum in coppers to the prisoner, together with a bag which Cufflin believed to be the prisoner's bag, but which was in fact the unopened bag containing Jinks' wages. The prisoner having received the 3*d.* and Jinks' bag containing the 7*s.* 11½*d.*, immediately went away.

The witness Hillman said that he was present when Cufflin gave a bag and three coppers to the prisoner, and was with the prisoner when he came out with the bag and three coppers; that the prisoner emptied some money out of a paper bag into his hand, and that the money consisted of silver and copper coins, including three or four large silver coins; that the prisoner said, "The biter has got bit," and added, "He has paid me double wages;" and that after shewing the money to the witness, the

prisoner turned round to another man and said, "Come on, we'll go and have a drink on it." (1)

At the close of the case for the prosecution the counsel for the prisoner submitted that there was no case to go to the jury, contending that the evidence failed to shew that the prisoner at the time he received the 7*s.* 11½*d.* from Cufflin had the animus furandi essential to constitute the offence of larceny, and that any subsequent fraudulent appropriation of the money by the prisoner was immaterial in so far as the offence of larceny was concerned.

The recorder ruled that there was evidence to go to the jury of the prisoner having the animus furandi at the time he received from Cufflin the 7*s.* 11½*d.*, and also ruled, in deference to the opinion of some of the judges in *Reg.* v. *Ashwell* (2), that if the prisoner received the 7*s.* 11½*d.* innocently, but afterwards fraudulently appropriated the money to his own use, he was guilty of larceny.

In answer to two questions put to them by the recorder, the jury found that the prisoner did not know that the bag containing the 7*s.* 11½*d.* did not belong to him at the time he received it from Cufflin, but that, having received the bag and its contents innocently, he afterwards fraudulently appropriated them to his own use; upon which findings the recorder directed a verdict of guilty to be entered on the first count of the indictment.

The question for the Court was whether, the jury not having found affirmatively that the prisoner had the animus furandi at the time he received the money from Cufflin, he could be rightly convicted of larceny by reason of the subsequent fraudulent appropriation by him of the money to his own use. The prisoner was admitted to bail, to come up for judgment at the next sessions.

No counsel appeared.

LORD COLERIDGE, C.J. This is a case which might have raised a difficult and subtle question, but from the mode in which it has been stated by the learned recorder there appears to be a clear

(1) It did not appear from the case how long a time elapsed between the receipt of the money by the prisoner and its subsequent fraudulent appropriation by him; but the inference from the evidence of Hillman would seem to be that it was very short.

(2) 16 Q. B. D. 190.

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distinction between it and *Reg.* v. *Ashwell.* (1) In that case the judges who were in favour of upholding the conviction did not intend to question the ancient doctrine that an innocent receipt of a chattel and its subsequent fraudulent appropriation do not constitute larceny. On the contrary, it will be seen from the judgment of one of the judges in that case that he expressly accepts that rule of law. In the present case the learned recorder directed the jury that if the prisoner innocently received the money and afterwards fraudulently appropriated it, he was guilty of larceny. It was not our intention in *Reg.* v. *Ashwell* (1) to enunciate any such rule, and the law has been incorrectly laid down to the jury by the learned recorder; they may have thought consistently with his direction that a fraudulent appropriation six months after the original receipt would be sufficient to warrant them in convicting the prisoner of larceny. We are asked to say whether the jury were wrongly directed, and we are of opinion that they were. If the judgments of the seven judges who affirmed the conviction in *Reg.* v. *Ashwell* (1) are carefully read, it will be seen that there is a most substantial difference between that case and the present, and that those judges were of opinion that to justify a conviction for larceny the receipt and appropriation must be contemporaneous.

MANISTY, J. I am of the same opinion, and am glad that the opportunity has occurred for stating the substance of the decision in *Reg.* v. *Ashwell.* (1) The difference of opinion amongst the judges in that case was founded on the facts of the case and on the application to those facts of the settled principle of law, that innocent receipt of a chattel coupled with its subsequent fraudulent appropriation does not amount to larceny. Some of the judges thought that the facts of that case did not shew an innocent reception of the sovereign, and said that it was larceny, others thought that the reception was innocent, and held that it was not larceny. I am glad to think that the old rule of law still exists in its entirety.

HAWKINS, J. The old rule of law was never really questioned by any of the judges in *Reg* v. *Ashwell.* (1) This case is altogether

(1) 16 Q. B. D. 190.

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different; the recorder told the jury that if the prisoner received the 7*s.* 11½*d.* innocently, and afterwards appropriated it to his own use, he was guilty of larceny. It is perfectly clear to my mind that it could not be so. The summing-up here shews that the learned recorder was under a misapprehension as to the rule of law.

DAY, J. As one of the judges who dissented from the conviction in *Reg.* v. *Ashwell* (1) I only say that I think that this conviction cannot be supported.

GRANTHAM, J., concurred.

Conviction quashed.

W. J. B.

THE QUEEN *v.* THE JUSTICES OF TYNEMOUTH. *Feb.* 22.

Justices—Summary Conviction—Penalty, Imprisonment for non-payment of—Hard Labour—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 5.

The 5th section of the Summary Jurisdiction Act, 1879, authorizes the infliction of imprisonment with hard labour for default in payment of a penalty adjudged to be paid by a summary conviction where the Act on which the conviction is founded authorizes the infliction of imprisonment with hard labour as a punishment for the offence.

APPLICATION for a writ of certiorari to bring up a conviction.

The applicant had been summarily convicted under the 13th section of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), of having allowed premises of which he was the occupier to be used as a brothel. The magistrates inflicted upon him a penalty, with the alternative, in case of non-payment of such penalty, of imprisonment for fourteen days with hard labour.

J. L. Walton, moved for a rule nisi for a certiorari. The magistrates had no power to impose imprisonment with hard labour for default in payment of the penalty. The Criminal Law Amendment Act, 1885, s. 13, empowers the magistrates to inflict a penalty or imprisonment with hard labour for the offence. There is no provision in the Act for imprisonment for default in payment of the penalty. The Summary Jurisdiction

(1) 16 Q. B. D. 190.

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Act, 1879 (42 & 43 Vict. c. 49), s. 5, gives a scale of imprisonment for non-payment of penalties, and provides that "such imprisonment shall be without hard labour except where hard labour is authorized by the Act on which the conviction is founded." The meaning is that, where such Act authorizes the infliction of imprisonment with hard labour for non-payment of the penalty, as is the case in many Acts, e.g., the Malicious Injuries Act, 1861 (24 & 25 Vict. c. 97), s. 52, it may be inflicted under the Summary Jurisdiction Act, s. 5. It was never meant to authorize imprisonment with hard labour for non-payment of the penalty where there is no power to imprison with hard labour for such non-payment given by the Act under which the conviction takes place. The magistrates might, if they had thought fit, have inflicted the punishment of imprisonment with hard labour, but they decided only to impose a pecuniary penalty, and it is submitted that they had no power to give an alternative sentence of imprisonment with hard labour.

LORD COLERIDGE, C.J. I think that the rule must be refused. In my opinion the magistrates had power to make this order. Under the 13th section of the Criminal Law Amendment Act, 1885, the magistrates have power either to fine an offender or imprison him with or without hard labour. In order to see how a penalty is to be enforced, we have to look to the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 5, which provides that certain periods of imprisonment may be imposed for non-payment of the penalty, "and such imprisonment shall be without hard labour, except where hard labour is authorized by the Act on which the conviction is founded, in which case the imprisonment may, if the Court think the justice of the case requires it, be with hard labour, so that the term of hard labour awarded do not exceed the term authorized by the said Act." The meaning of that is, I think, that imprisonment with hard labour may be imposed for non-payment of the penalty where the offence is one for which the punishment of imprisonment with hard labour might have been imposed. This is a case in which the magistrates might have inflicted imprisonment with hard labour, and, therefore, as it seems to me, the penalty may be enforced by the same kind of imprisonment.

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HAWKINS, J. I am of the same opinion. I think that the true construction of the 5th section of the Summary Jurisdiction Act, 1879, is that it authorizes imprisonment with hard labour for non-payment of the penalty where the Act under which the conviction takes place authorizes the infliction of imprisonment with hard labour as a punishment for the offence.

Rule refused.

Solicitors for the applicant: *T. Cray, for Dix & Warlow.*

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Nov. 30.

OVERSEERS OF ST. GABRIEL, FENCHURCH, APPELLANTS; WILLIAMS, RESPONDENT.

Poor-rate—Purchase of Premises by Postmaster-General—Rateable Value at Date of Purchase—Telegraph Act, 1868 (31 & 32 *Vict. c.* 110), *s.* 22.

The Telegraph Act, 1868, empowers the Postmaster-General to purchase, for the purposes of the Act, the undertaking (including land and property) of any telegraph company, and s. 22 provides that all land, property and undertakings so purchased shall be assessable and rateable to parochial rates at sums not exceeding the rateable value at which such land, property and undertakings were properly assessed at the time of such purchase.

In 1870 the Postmaster-General purchased the undertaking of a telegraph company, including a house held by the company under a lease for twenty-one years from September, 1867. At the time of the purchase a portion of the house was subject to an underlease granted by the company to H. for the remainder of the term less one day, and containing a covenant by the company to pay all parochial rates. The Postmaster-General occupied and used, for telegraphic purposes only, the portion of the house not comprised in the underlease until the year 1878, when he demised that portion to others, and thenceforth no part of the house was occupied or used for telegraphic purposes. The rateable annual value at which the portion comprised in the underlease could properly have been assessed as a separate tenement at the time of the purchase was 108*l.* In 1880 the assessment committee of the district separately assessed that portion in respect of parochial rates at the rateable annual value of 334*l.*:—

Held, that s. 22 applied notwithstanding that all use of the house for telegraphic purposes had ceased, and therefore that the occupier of the premises comprised in the underlease was not liable to be assessed in any sum exceeding the rateable value at which these premises could have been properly assessed at the time of the purchase.

CASE stated under 42 & 43 Vict. c. 49, by two justices of the city of London.

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Upon the hearing of a complaint preferred by the appellants for that the respondent, being rated and assessed to the relief of the poor of the parish of St. Gabriel, Fenchurch, in respect of a tenement occupied by him, had failed to pay the sum of 38*l.* 19*s.* 4*d.* for two years' arrears of poor-rates, the justices dismissed the complaint.

The following material facts were stated in the case:—

The respondent was, during the period in respect of which the poor-rates were claimed, the occupier of certain rooms forming part of a messuage or tenement in Fenchurch Street.

In 1868 the Electric Telegraph Company obtained a lease for twenty-one years from the 29th of September, 1867, of the whole of the messuage, which they held as part of their undertaking, and the lease contained a covenant by the company to pay all parochial and other rates assessed upon the premises during the term.

By an indenture of underlease dated the 20th of February, 1868, the company demised the rooms in question to one Hopcraft for the remainder of their term of twenty-one years less one day, and covenanted with him to pay all parochial and other rates in respect of the demised premises during the continuance of the underlease.

The portion of the premises not comprised in the underlease to Hopcraft was occupied by the company, and used for the purposes of their undertaking, up to the commencement of the year 1870.

On the 28th of January, 1870, the Postmaster-General, under the powers conferred by the Telegraph Act, 1868 (1), purchased

(1) 31 & 32 Vict. c. 110, s. 4, enacts that "it shall be lawful for Her Majesty's Postmaster-General . . . from time to time out of any moneys which may be from time to time appropriated by Act of Parliament and put at his disposal for that purpose, to purchase for the purposes of this Act the whole, or such parts as he shall think fit, of the undertaking of any company; and any undertaking, and all other property purchased under the powers of this Act shall be vested in and held by Her Majesty's Postmaster-General . . . and his successors."

By s. 3: "The term 'the undertaking' shall mean the whole or any part of the electric and other telegraphs, wires, posts, pipes, tubes, and other works, instruments, materials, lands, tenements, hereditaments, and buildings . . . and all other property whatsoever of any company, corporation, or persons engaged in the United

and acquired the whole undertaking of the company, including (inter alia) the messuage in Fenchurch Street, and by virtue of s. 6 of that Act the underlease to Hopcraft of the 20th of February, 1868, remained in full force, and the Postmaster-General became, and still is, liable to perform all the covenants therein contained and on the part of the Electric Telegraph Company to be performed, in the place and instead of that company.

Hopcraft occupied the rooms comprised in the underlease to him up to the year 1877, and they were used by him solely for the purposes of his own business. In 1877 he assigned the underlease to the respondent, who thenceforth occupied and used the rooms solely for the purposes of his business.

From 1870 to 1878 the Postmaster-General occupied and used that portion of the premises which was not subject to the underlease for the public purposes of the Post Office, but in 1878 he granted an underlease of the same part to Hardy and Jackson, and thenceforth no part of the premises were used for the purposes of the Post Office.

At the time of the purchase and acquisition by the Postmaster-General of the property and undertaking of the Electric Telegraph Company the premises in question in their entirety were properly assessed to the poor-rate of the parish at the total rateable value of 280*l.* per annum, of which sum 108*l.* per annum represented the rateable value at which the rooms in question would have been properly assessed if they had been assessed as an independent tenement and separate from the residue of the premises.

The premises in their entirety continued to be assessed at the total rateable value of 280*l.* per annum until the general assessment in 1880, when the assessment committee divided the premises for rating purposes into two portions, each of which they assessed as a separate tenement. The portion occupied by the

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Kingdom . . . in transmitting messages for money or other consideration by means of electric or other telegraphs."

By s. 22: "All land, property, and undertakings purchased or acquired by the Postmaster-General under this Act shall be assessable and rateable in respect to local, municipal, and parochial rates, assessments, and charges at sums not exceeding the rateable value at which such land, property, and undertakings were properly assessed or assessable at the time of such purchase or acquisition."

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respondent was called No. 1, Mincing Lane, and re-assessed at a rateable annual value of 334*l.*, and the residue of the premises was distinguished as 42, Fenchurch Street, and re-assessed at an equal rateable annual value of 334*l.*

Notice of the division of the premises and re-assessment was served on the respondent, who did not appeal against his assessment.

It was contended for the respondent that by s. 22 of the Telegraph Act, 1868, the premises could not be rated at a sum exceeding the amount at which they were rated when the Postmaster-General acquired them, and therefore that the respondent was only liable to pay on 108*l.*, being the due proportion of the amount of 280*l.* at which the whole of the premises were rated when they were so acquired.

It was contended for the appellants that, the Postmaster-General having ceased to occupy the premises, the Telegraph Act, 1868, had no application: that, the claim being made against the respondent as occupier of the premises now called No. 1, Mincing Lane, he was liable to pay according to the value of his occupation, and that the appellants were not affected by the contract between him and the Postmaster-General.

The question for the opinion of the Court was whether, having regard to s. 22 of the Telegraph Act, 1868, the appellants were entitled to be paid poor-rates on a higher assessment than that in force when the premises were acquired by the Postmaster-General.

A. C. Nicoll, for the appellants. The respondent is not relieved from the ordinary liability of an occupier of property to be assessed in respect of poor-rates according to the law in force when the assessment is made. The Postmaster-General has ceased to occupy or use for telegraphic purposes any part of the premises, and is therefore not liable in law to pay poor-rates in respect of them. The intention of the legislature was to provide that parishes should receive poor-rates from the Crown in respect of property acquired and used for telegraphic purposes; but s. 22 limits the liability to the rateable value of the property at the time it was so acquired. That section is intended to apply only so long as

the property is used and held for the purposes of the Act. It would be unreasonable that property should be assessed for all time at the rateable value which it had when it was acquired for the purposes of the Act.

Sir John Gorst, S.G. (*Casserley* with him), for the respondent. The Postmaster-General, when he acquired the premises, became liable under the covenant of the Telegraph Company with Hopcraft. He is under no such liability in respect of the other portion of the premises. Sect. 14 gives the Postmaster-General power to lease all or any portion of the undertaking or property acquired under the powers of the Act; and in face of that power the legislature have enacted in clear terms by s. 22 that all land, property, and undertakings purchased or acquired by the Postmaster-General under the Act should be assessable and rateable at sums not exceeding the rateable value at the time of the purchase or acquisition. The legislature therefore contemplated that property leased by the Postmaster-General should be subject to the provisions of s. 22. The construction contended for by the appellants would involve reading into s. 22 the words "and occupied by the Postmaster-General." Here he is still owner of the property purchased from the Electric Telegraph Company, which property is part of the undertaking, and therefore within the terms of s. 22. The legislature contemplated that the acquisition of property by the Postmaster-General might enhance its value, and intended to protect parishes from loss on the one hand whilst protecting the revenue on the other. The Postmaster-General, as part of the undertaking he purchased, took over the right to receive rent from Hopcraft subject to the obligation to pay rates. If the assessment of the premises can be raised above the limit provided by s. 22 an additional burden is thrown upon the Postmaster-General contrary to the intention of the Act, because he would obtain a less rent for the premises. It is unnecessary to consider what would be the effect had he sold the undertaking.

A. C. Nicoll, in reply. The parish authorities are not affected by any contract as to payment of rates between landlord and tenant, except in certain cases provided for by statute where the premises are under the yearly value of 20*l*. The Postmaster-

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General purchased the premises subject to the then existing lease to Hopcraft, and he became liable under the covenant in that lease to pay all rates legally assessable upon the premises occupied by Hopcraft or his assignee. The power of leasing conferred by s. 14 is only in respect of telegraphic undertakings and property used and occupied therefor. The definition of "undertaking" in s. 3 narrows the meaning of the term to the property and things occupied and used for telegraphic purposes.

[MATHEW, J.:—If the occupier under the Postmaster-General is liable to be assessed irrespective of s. 22, the Postmaster-General loses the benefit of that section, because the rent he could obtain would be reduced in consideration of the increase in the rate.]

It is submitted that the statute intended that he should receive the benefit of s. 22 so long only as the premises were occupied and used for telegraphic purposes. A covenant by the landlord to pay rates is unusual. In the absence of such a covenant the occupier clearly could not claim the benefit of s. 22. If that section applies here the Postmaster-General will obtain a higher rent by reason of the covenant.

MATHEW, J. I am of opinion that our judgment must be for the respondents.

The question turns upon the true construction of s. 22 of 31 & 32 Vict. c. 110. Now it is perfectly clear that that section is a compromise between two conflicting claims—claims of parishes on the one hand to be paid rates in respect of properties which had been previously rated, and claims of the Crown on the other hand to be relieved of assessments in respect of property held for public purposes. The compromise appears to me to be that the property should continue to be rateable, but that its rateable value should not be deemed to be enhanced by reason of the use to which it is put, and the assessment should therefore be the rateable value at which the property was properly assessed at the time of its acquisition by the Postmaster-General.

Here the house was acquired by the Postmaster-General under the powers of the Act of 1868. The whole of the house not being required for telegraphic purposes, a portion of it was let under

the powers conferred upon the Postmaster-General by s. 14 of the Act. After a time it was found that the remaining portion of the house, which was for a time occupied by the Postmaster-General for the purposes of the Act, was no longer required for those purposes, and a lease was granted of that portion. The upper part of the premises (being the part comprised in the underlease) was subject to a covenant by the lessor that he would pay all rents, taxes, and assessments. No such clause, I understand, is inserted in the lease of the lower portion. The question is, whether the property so dealt with under the powers of the Act still remains, or has ceased to remain, under the operation of s. 22. The language of the Act is perfectly plain. The appellants' counsel argued that we ought to read it as meaning that all land, property, and undertakings purchased or acquired *and held* by the Postmaster-General shall be taxed in accordance with s. 22, and that the result of construing the language of the Act otherwise would be so unreasonable that it ought not to be interpreted according to its ordinary meaning. I can see very good reason why the legislature should have enabled the Postmaster-General to lease the premises on the terms provided by s. 22. If he acquired property for the purpose of the undertaking, clearly s. 22 applied. If the property was let, whether for the purposes of telegraphy or otherwise, to any tenant, it seems perfectly reasonable that the Postmaster-General should be allowed to let it upon the terms on which he entered it himself. Otherwise he would indirectly suffer by the transaction, because the rent he could obtain would be diminished from the fact that the property was enhanced as to its rateable value by reason of its having been used, or the adjoining land having been used, for public purposes.

In my opinion the decision of the magistrates was right, and should be upheld.

A. L. SMITH, J. I am entirely of the same opinion, and need only add this:—We are not dealing with a case in which the Postmaster-General, if he could, has sold the property after having purchased it under this Act. That point can be dealt with when it arises. He purchased the undertaking, and still

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holds the undertaking; it seems to me in face of s. 22 it is impossible to support the contention raised for the appellants.

Judgment for the respondent. Leave to appeal was given.

Solicitor for appellants: *L. J. B. Rawlins.*

Solicitor for respondent: *John Hunter, Solicitor to the Post Office.*

W. A.

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March 1.

ROSELLE *v.* BUCHANAN.

Practice—Particulars—Slander—Names of Persons to whom Slander was uttered.

In an action for slander the Court ordered the plaintiff, upon a summons taken out by the defendant before delivery of the defence, to give particulars of the names of the persons to whom the alleged slander was uttered.

MOTION by way of appeal from a decision of Field, J., at chambers.

The statement of claim alleged that the defendant falsely and maliciously spoke and uttered of the plaintiff certain slanderous words therein set out.

The plaintiff claimed 500*l.* damages, but did not allege any special damage.

The defendant before delivering his defence took out a summons for particulars (inter alia) of the names of the persons to whom the alleged slander was uttered.

Field, J., ordered such particulars to be given.

H. Kisch, for the plaintiff. This case comes within the rule stated by Cotton, L.J., in *Eade* v. *Jacobs* (1), that a party to an action is not bound to give the names of the persons whom he intends to call at the trial, nor can he be required to discover the evidence which he proposes to adduce. It may be said that the practice in chambers has been, in actions of slander, to compel the plaintiff to give the names of the persons to whom the words were spoken, but that has been doubted by Grove, J., in *Bradbury* v. *Cooper.* (2)

(1) 3 Ex. D. at p. 337. (2) 12 Q. B. D. at p. 95.

[GROVE, J. Those were obiter dicta merely. I am inclined to follow the practice in chambers, if it exists.]

At any rate the plaintiff cannot be compelled to give the particulars before the defence is delivered. The defendant cannot require the particulars for the purpose of stating his defence.

O. B. Martyn, for the defendant. The order of Field, J., affirmed the order of a master, and both the learned judge and the master stated that it was the uniform modern practice in chambers to require these particulars to be given.

He was stopped.

GROVE, J. But for the practice at chambers I think that I should have agreed with the view put forward by the plaintiff's counsel, because where the defendant himself is alleged to have uttered the words complained of he may be supposed to know to whom they were uttered. But, having made inquiry, it seems clear that the modern practice is to order particulars to be given of the names of the persons to whom the words were uttered. I am of opinion that the order of Field, J., was right.

STEPHEN, J., concurred.

Motion dismissed.

Solicitor for plaintiff: *F. C. James.*

Solicitor for defendant: *W. E. Martyn.*

W. A.

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March 4, 5, 6.

WEBB & SONS *v.* SHAW.
FAULKNER AND ANOTHER, CLAIMANTS.

Practice—Interpleader—Summary Decision—Appeal from Master to Judge by leave—Order LIV., r. 12, *Order LVII., rr.* 8, 11—*Common Law Procedure Act,* 1860 (23 *&* 24 *Vict. c.* 126), *s.* 17.

Where a master summarily decides an interpleader matter under Order LVII., r. 8, and gives leave to appeal, a judge at chambers has jurisdiction to entertain such appeal by virtue of the provisions of Order LVII., r. 11.

APPLICATION to set aside an order made by Field, J., at chambers, on the ground that he had no jurisdiction to make such order.

A master at chambers had, under the provisions of Order LVII., r. 8, summarily decided an interpleader matter with regard to goods taken in execution, barring the claimants, but giving special leave to appeal to the judge. On appeal to Field, J., at chambers, it was contended for the judgment creditors that there was no appeal from the decision of the master, but the learned judge entertained the appeal, and, reversing the decision of the master, decided in favour of the claimants. (1)

Bosanquet, Q.C., and *Hickey*, for the judgment creditors, moved to set aside the order of Field, J. By virtue of the provisions of Order LIV., r. 12, which gives the master the jurisdiction of the judge in such cases, the master may exercise the jurisdiction given by Order LVII., r. 8, to decide an interpleader matter summarily, and from such decision there is no appeal. The decision of the master stands on the same footing as that of a judge, and s. 17 of the Common Law Procedure Act, 1860, which enacts that the summary decision by a judge of an interpleader matter shall be final, is not repealed. It was held that s. 50 of

(1) Order LVII., rule 11, provides that: "Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a judge in a summary way under rule 8 of this Order shall be final and conclusive against the claimants and all persons claiming under them, unless by special leave of the Court or judge, as the case may be, or of the Court of Appeal."

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the Judicature Act, 1873, which gives a general right of appeal from the judge at chambers, had not the effect of impliedly repealing s. 17 of the Common Law Procedure Act, 1860: *Dodds* v. *Shepherd* (1); *Turner* v. *Bridgett* (2); *Buse* v. *Roper*. (3) Order LVII., r. 11, cannot have the effect of giving an appeal where leave to appeal is given. It is not an enabling but a prohibitory section intended to restrain appeals, and cannot have the effect of giving an appeal where such an appeal is prohibited by a statute. Assuming that, if it stood alone, it would by necessary implication give a right of appeal where leave is given, it cannot have the effect of repealing the positive enactment of a statute that there shall be no appeal. The power of making rules given by the Judicature Act is confined to matters of procedure, and the giving of an appeal where there was none before is not mere matter of procedure. Therefore, so far as rule 11 may be held to give an appeal, it is ultra vires. *Waterhouse* v. *Gilbert* (4) is a decision to the effect that the provisions of rule 11 cannot operate to repeal a statute prohibiting an appeal.

[SMITH, J., referred to *Robinson* v. *Tucker* (5) and *Dawson* v. *Fox*. (6)]

The observations made by the judges in those cases, from which it may be inferred that rule 11 is a valid rule and gives an appeal where special leave is given, are only dicta, for this point was not involved in those cases.

Manby, for the claimants, shewed cause. Order LVII., r. 11, has the effect of giving an appeal from the master's decision to the judge where special leave to appeal is given upon the summary decision of an interpleader matter. The words in the rule "except where otherwise provided by statute" mean except where any statute may give an appeal. It is impossible to construe the rule otherwise than as giving an appeal where leave is given, because the prohibition of appeal in all but a certain case necessarily implies that there is an appeal in the excepted case.

(1) 1 Ex. D. 75.
(2) 9 Q. B. D. 55.
(3) 41 L. T. 457.
(4) 15 Q.B.D. 569; 54 L.J. (Q.B.D.) 440.
(5) 14 Q. B. D. 371.
(6) 14 Q. B. D. 377.

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Waterhouse v. *Gilbert* (1) is not an authority to shew that there cannot be an appeal from the master to the judge, where there is special leave given; for the decision of the case in the Divisional Court really went on the ground that there had been an agreement between the parties that the decision of the master should be final, and the decision in the Court of Appeal was merely that there was no appeal from the Divisional Court to that Court. In *Robinson* v. *Tucker* (2) and *Dawson* v. *Fox* (3) the Court of Appeal seems most clearly to have been of opinion that under Order LVII., r. 11, there would be an appeal with leave. The rule has the force of a statute: *Snelling* v. *Pulling* (4), and it therefore repeals s. 17 of the Common Law Procedure Act, 1860. It is not ultra vires as dealing with a matter other than mere procedure. It cannot be said that in this case the rule creates an appeal in the sense that it gives an appeal from a decision which before the rule would have been final. Order LIV., r. 12, gives de novo to the master the power to exercise the jurisdiction previously exercised by the judge with regard to the summary decision of interpleaders, and it is mere procedure to provide that it shall be a condition of the exercise of such jurisdiction that if the master thinks fit to give leave there shall be an appeal to the judge.

Bosanquet, Q.C., in reply.

Cur. adv. vult.

March 8. MATHEW, J. I am of opinion that this application must be refused. The application is to set aside the order of Field, J., made upon an appeal pursuant to special leave from the decision of a master summarily disposing of an interpleader matter. The objection was taken before the learned judge that he had no jurisdiction to entertain the appeal, and upon the authorities which were brought to his notice he decided, though not, as I understand, without hesitation, that he had jurisdiction to hear the appeal, and, having heard it, he came to the conclusion that the decision of the master was wrong, and must be reversed. It was argued before us by the counsel for the judg-

(1) 15 Q. B. D. 569; 54 L. J. (Q. B. D.) 440.
(2) 14 Q. B. D. 371.
(3) 14 Q. B. D. 377.
(4) 29 Ch. D. 85.

ment creditors, that a judge has no jurisdiction to hear an appeal from the decision of a master summarily disposing of an interpleader matter under Order LVII., r. 8, even where leave to appeal was given, and reliance was placed in support of that contention upon the case of *Waterhouse* v. *Gilbert.* (1) It was said that the decision in that case really concluded the present question as involving the proposition that there can never be an appeal either with or without leave from the master to the judge where an interpleader has been summarily decided. But we understand that, Denman, J., having held at chambers that there was no appeal, the Divisional Court refused to entertain the appeal from his decision, on the ground that in their opinion there had been an agreement between the parties that the decision of the master should be final: and the Court of Appeal held that no appeal lay to that Court from the decision of the Divisional Court in the case of an interpleader matter disposed of summarily, the ground of their judgment being that by the combined operation of s. 17 of the Common Law Procedure Act, 1860, and s. 20 of the Appellate Jurisdiction Act, 1876, such an appeal was prohibited. It is clear, therefore, that neither the decision of the Divisional Court nor that of the Court of Appeal in that case is any authority in favour of the contention put forward for the judgment creditors in the present case, and that the case is only an authority for the proposition that there cannot be an appeal to the Court of Appeal from the decision of the Divisional Court in respect of an interpleader matter disposed of summarily. It was further argued for the judgment creditors that the provisions of rule 11 of Order LVII., so far as they affected to give an appeal, were ultra vires as being contrary to the provisions of the 17th section of the Common Law Procedure Act, 1860; that that section still remained in force, and there was no power to make a rule in contravention of its provisions. In answer to that view our attention was called to two cases, viz., *Robinson* v. *Tucker* (2) and *Dawson* v. *Fox* (3), and it was said that in both cases the Court of Appeal treated rule 11 of Order LVII. as a good rule, and assumed that, where leave was

(1) 15 Q. B. D. 569; 54 L. J. (Q. B. D.) 440. (2) 14 Q. B. D. 371.
(3) 14 Q. B. D. 377.

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given to appeal under it, there might be an appeal. It was further argued that the general provisions of s. 24 of the Judicature Act, 1875, enabling rules of Court to be made modifying the provisions of an Act of Parliament with regard to the procedure of the Court, authorized the making of rule 11. On the other hand, it was said that giving an appeal from the master to the judge in such a case was not mere matter of procedure. With this latter view I am unable to concur.

It is to be observed that accompanying rule 8 of Order LVII. are the provisions of rule 9, both rules being in substance taken from the Common Law Procedure Act, 1860. Rule 9 enables the master to order that a special case be stated where the question is one of law which he thinks proper for the consideration of the Court. That provision clearly is matter of procedure only. Then are not these two rules in pari materiâ? Instead of ordering a special case to be stated, the master may, in cases within rule 8, dispose of the matter summarily if he thinks fit, subject however to an appeal, if he considers it right to give leave to appeal. On the other hand, if he thinks the matter one for a special case, he may direct that it be brought before the Court on a special case, in which case there would be an appeal. It appears to me that these rules were intended to form a code giving a new procedure in interpleader cases, and I think that it is a matter of procedure merely to provide, while giving power to the master to exercise the jurisdiction of a judge with regard to the summary disposal of interpleader matters, that he shall exercise such jurisdiction subject to the parties having an opportunity of going before the judge if the master thinks it right they should have such opportunity.

I think that rule 11 is within the powers given for making rules with regard to procedure.

SMITH, A. L., J. This is a question of some importance with regard to the practice in cases where masters dispose of interpleaders summarily at chambers. I wish to confine my judgment entirely to the question whether there is an appeal from the master to the judge where the master has given leave to appeal. It is conceded that before the new rules, where a judge at

chambers summarily disposed of an interpleader, there could not by reason of s. 17 of the Common Law Procedure Act, 1860, be any appeal to the Divisional Court. But, the new rules having come into operation, we have to consider what their effect may be upon the practice in interpleader matters. By Order LIV., r. 12, it is provided that a master may exercise the jurisdiction of a judge at chambers with regard to the summary disposal of interpleader matters; and by Order LVII., r. 11, it is provided that, "except where otherwise ordered by statute," which I think must mean except where any statute may provide for an appeal, "the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a judge in a summary way under rule 8, of this Order, shall be final and conclusive against the claimants and all persons claiming under them, unless by special leave of the Court or judge, as the case may be, or of the Court of Appeal." Order LIV., r. 12, having provided that a master may dispose of an interpleader summarily, it becomes necessary to consider the effect of Order LVII., r. 11, which says that there shall be no appeal in the case of such summary decision without leave. If rule 11 be not ultra vires, it is in my opinion manifest that, in a case where the master has decided summarily and given leave to appeal, there is an appeal under the terms of the rule. It is not disputed that this would be so, but it is said that s. 17 of the Common Law Procedure Act, 1860, having provided that there shall be no appeal in the case of a summary decision by a judge, and the power given to make rules being a power to make rules with regard to practice and procedure only, the rule is ultra vires, because the giving of a right of appeal where a statute previously prohibited an appeal is not mere matter of practice or procedure. It is most material to observe that by rule 12 of Order LIV., a new jurisdiction was given to the master, he being by that rule empowered to exercise the jurisdiction of a judge with regard to the disposal of interpleaders summarily, and it seems to me that, where the rules were thus conferring a jurisdiction on the master, there was power to say that such jurisdiction should be subject to an appeal to the judge if the

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master thought fit to give leave to appeal. Why is this not matter of procedure? There was power to give by rule the jurisdiction to the master to hear; then why not power to give him jurisdiction to hear coupled with a right of appeal by leave? In my judgment there was, and such a rule is a rule with regard to practice or procedure. We were pressed with the case of *Waterhouse* v. *Gilbert* (1), in which it was said that Denman, J., had decided at chambers that there could be no appeal from a master to a judge at chambers, where the master had decided an interpleader summarily, and that the Divisional Court and the full Court of Appeal consisting of six judges had confirmed his decision. It appears, however, to be the fact that the Divisional Court decided on the ground that there had been an agreement between the parties that the decision of the master should be final (see specially the report of the case in the *Law Journal*) and it is not improbable that my Brother Denman in truth acted on the same view. If the case really were a decision that there could be no appeal from the master to the judge where leave was given, of course I should feel bound by it, but it appears to me that neither in the Divisional Court, nor the Court of Appeal, is the case any authority for that proposition. Two other authorities were cited, viz., *Robinson* v. *Tucker* (2) and *Dawson* v. *Fox*. (3) Neither of these cases directly decide the point now before us, but in the first of them the Master of the Rolls, discussing Order LVII., r. 11, clearly seems to be of opinion that with leave there may be an appeal from the master to the judge, for he says: "Now under the Rules of the Supreme Court, 1883, Order LVII., r. 11, there may be an appeal against that order by special leave." In *Dawson* v. *Fox* (3) he says: "It was then thought right to deal with interpleaders by the rules of 1883, on the footing that instead of a statute, everything regulating interpleader proceedings should be provided for by the rules, and thereupon rule 11, of Order LVII., was made as a substitute for the statutory enactment. The words of that rule have been carefully selected to shew that the rule makes no alteration of the law. As was formerly the case, so now,

(1) 15 Q. B. D. 569; 54 L. J. (Q. B. D.) 440. (2) 14 Q. B. D. 371.
(3) 14 Q. B. D. 377.

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the whole interpleader matter may be finally disposed of in a summary way by the Court or by a judge at chambers, or by the judge at the trial after he has determined the trial of the issue. None of these can be appealed against without leave."

Confining my judgment to the question now before us, viz., whether in such a case as this there can be any appeal to the judge from the master where leave has been given, I am of opinion that there can be such an appeal, and therefore the order of Field, J., must stand.

Application refused.

Solicitors for judgment creditor: *Walker, Son, & Field, for C. Herbert Collis.*

Solicitors for claimants: *Lane, Fagg, & Andrews, for Manby.*

E. L.

IN RE IVES. EX PARTE ADDINGTON.

March 4.

Bankruptcy—Practice—Judgment Debtor Summons—Order of High Court for Payment of Costs—Power of County Court to order Payment by Instalments—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 103, *sub-s.* 4—*County Courts Consolidated Orders,* 1875, *Order* XIX., *r.* 9—*Forms* 40, 235.

Where the High Court has simply made an order for the payment of costs, or given judgment for the payment of a sum of money, a county court can, by virtue of the Debtors Act, 1869, s. 5, and the Bankruptcy Act, 1883, s. 103, sub-s. 4, enforce that order or judgment by directing payment of the amount thereof by instalments. A county court cannot, however, rescind or vary an order of the High Court for the payment of a judgment debt by instalments, since in such a case the High Court has considered and adjudicated upon the question of the debtor's ability to pay forthwith.

Washer v. *Elliot* (1 C. P. D. 169) explained.

SUMMONS by a judgment creditor asking for an order for the payment by instalments of a judgment debt.

The judgment creditor was plaintiff in an action of *Addington* v. *Ives,* brought in the Queen's Bench Division of the High Court, in which he obtained against the defendant an order for the payment of certain costs which were taxed at 11*l.* 11*s.* 10*d.*

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The debtor agreed to pay this amount by instalments of 1*l.* a month.

Addington had also presented a petition in bankruptcy against Ives. This petition was dismissed, and an order was made on August 19, 1885, in the High Court in Bankruptcy by consent, ordering that Ives should pay Addington the sum of 25*l.*, the agreed costs, on or before the 19th of September, 1885.

In this case also the debtor consented to an order for payment by instalments of 1*l.* a month.

The judgment creditor then took out summonses under the Debtors Act, 1869 (32 & 33 Vict. c. 62, s. 5), in the county court holden at Brentford, asking that an order might be made for the payment of these sums by instalments of 1*l.* a month.

The judge of the county court refused to make the order, on the ground that he had no jurisdiction to interfere with the order of a superior Court for the payment of a larger sum.

The judgment creditor then took out a summons before Cave, J., in chambers asking him, not by way of appeal, but in the exercise of his concurrent jurisdiction, to make the orders which the county court judge had refused to make.

Mr. Sherrard, solicitor, for the judgment creditor.

The judgment debtor in person.

The learned Judge reserved his decision, and afterwards delivered the following judgment:—

CAVE, J. This case raises a question of some importance as to the power of judges of county courts to make orders under the Debtors Act, 1869 (32 & 33 Vict. c. 62), for enforcing judgments of the High Court of Justice.

On the 14th of April, 1885, the plaintiff obtained an order against the defendant in the Queen's Bench Division of the High Court of Justice for the payment of certain costs, which were taxed at 11*l.* 11*s.* 10*d.* Subsequently, on the application of the plaintiff, a judgment summons under the Debtors Act, 1869, was issued out of the Brentford County Court, but on the hearing of the summons the learned judge declined to make an order for payment by instalments, on the ground that he had no jurisdiction

to interfere with the order of a superior Court for payment of a larger sum. I am informed that other learned judges besides the judge of the Brentford County Court entertain doubts as to their jurisdiction in these cases; although one of them, the learned judge of the county court at Margate, has since, on further consideration, altered his views on the subject. For these reasons I thought it better to put my opinion into writing. Section 5 of the Debtors Act, 1869, provides that, "subject to the provisions hereinafter mentioned and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court: provided (1) That the jurisdiction by this section given of committing a person to prison shall, in the case of any Court, other than the superior Courts of Law and Equity, be exercised only subject to the following restrictions, that is to say:

"(*a.*) Be exercised only by a judge or his deputy, and by an order made in open court, and showing on its face the ground on which it is issued:

"(*b.*) Be exercised only as respects a judgment of a superior Court of Law or Equity when such judgment does not exceed fifty pounds exclusive of costs."

This sub-section has been repealed by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 169 and sched. 5).

"(*c.*) Be exercised only as respects a judgment of a county court by a county court judge or his deputy."

Sub-section 2 provides that such jurisdiction shall only be exercised on proof of means, states how such proof may be given, and proceeds to enact that "any jurisdiction by this section given to the superior Courts may be exercised by a judge sitting in chambers or otherwise in the prescribed manner. For the purposes of this section any Court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments, and may from time to time rescind or vary such order." The same section enacts that

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"this section, so far as it relates to any county court, shall be deemed to be substituted for sections 98 and 99 of the County Court Act, 1846, and that Act and the Acts amending the same shall be construed accordingly, and shall extend to orders made by the county court with respect to sums due in pursuance of any order or judgment of any Court other than a county court."

This section gives "any Court" (which includes a county court) power to enforce by committal a judgment or order of any competent Court, with the proviso that when the judgment is that of a superior Court, the jurisdiction is to be exercised only when the judgment does not exceed 50*l.* exclusive of costs; a subsequent part of the section enables any Court (which again must include a county court) to direct any debt due in pursuance of any order or judgment of that or *any other* competent Court (including therefore an order or judgment of the High Court) to be paid by instalments.

The rules are equally clear on the subject.

By Order XIX., r. 9, of the Consolidated County Court Orders and Rules, 1875, being the rules for regulating proceedings for committal under the Debtors Act, 1869, it is provided that, "Where a party desires to enforce by commitment in any county court a judgment of any competent Court, he shall obtain from such Court an office copy of the judgment he desires so to enforce, and shall file such office copy, together with an affidavit of the sum then due thereon, with the registrar of the court of the district in which the party against whom the same is to be enforced resides or carries on business, who shall thereupon issue a judgment summons."

Form 235, in Appendix II. to those rules, is a form of summons for non-payment of a judgment or order of the High Court.

Form 40 is a form of order directing the amount due on a judgment of the High Court to be paid by instalments. (1)

The Bankruptcy Act of 1883 (46 & 47 Vict. c. 52) enacts by s. 103, sub-s. 4, that "every county court within the jurisdiction

(1) Order XXV., r. 17, and Forms 53 and 54 are the corresponding rule and forms in the County Court Rules, 1886, which annul as from the 28th of April, 1886, the County Court Rules, 1875.

of which a judgment debtor is or resides shall have jurisdiction under s. 5 of the Debtors Act, 1869, although the amount of the judgment debt may exceed 50*l.*" It appears to me that these enactments give a county court power to enforce the order or judgment of the High Court by directing payment thereof by instalments and to commit the debtor in case of non-payment of the instalments.

Only one other point remains, and that is whether an order for payment of costs is a debt due in pursuance of any order or judgment of the Court; but this question was settled in the affirmative in the case of *Hewitson* v. *Sherwin.* (1)

It may be asked how in the face of these enactments it could ever have been supposed that the county court had no jurisdiction to make an order directing payment by instalments of the amount due under a judgment or order of the High Court.

The authority cited in support of the contention that the county court has no such jurisdiction is *Washer* v. *Elliot* (2), where it was held that the power given to inferior Courts by the Act to rescind or vary orders does not enable an inferior Court to rescind or vary an order of a superior Court for payment of a judgment by instalments. The passages in Pollock & Nicoll (3), and Pitt Lewis's (4) books on county court practice are visibly founded on *Washer* v. *Elliot.* (2)

The words of sect. 5 of the Debtors Act, 1869, sub-s. 2, are "any Court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court, to be paid by instalments, and may from time to time rescind or vary such order." The words "such order" obviously refers to the order of the Court directing payment by instalments. The county court, therefore, may order payment by instalments of the amount due on an order or judgment of the High Court, and may rescind or vary its own order; but when the High Court has itself directed payment by instalments of its own judgment, the county court has no power to vary *that* order. This is all that was decided by the judgment in *Washer* v. *Elliot.* (2) The

(1) Law Rep. 10 Eq. 53.
(2) 1 C. P. D. 169.
(3) Pollock and Nicoll's Practice of County Courts, 9th ed. at p. 354.
(4) Pitt Lewis' County Court Practice, Part I., Book II., at p. 632.

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judgment in that case proceeds on the extravagance of a construction which would have enabled an inferior Court to rescind or vary the order of a superior Court for the payment of a judgment debt by instalments, and so make the inferior Court a Court of Appeal over the superior Court. The inconvenience of an inferior Court rescinding or varying an order of a superior Court for payment by instalments is obvious. In making the order for payment by instalments, the superior Court has had before it the question of the debtor's means, and it would be highly inconvenient that the inferior Court on the same or even on different evidence as to the debtor's means, should set aside or vary the order of the superior Court. But when the superior Court has simply made an order for the payment of costs, or given a judgment for the payment of a sum of money, it has not in any sense had before it the question of the debtor's means or his ability to pay forthwith or only by instalments, and when the county court makes an order for payment by instalments in such a case it does not in the slightest degree rescind or vary the order of the superior Court; but simply follows the direction of sect. 5 of the Debtors Act. *Washer* v. *Elliot* (1) is in truth no authority for the position taken up by the learned judge of the Brentford County Court, and the Act to my mind clearly gives the county court jurisdiction. Any other construction would involve intolerable expense and annoyance. Take the case of an order of the High Court made by the district registrar of Newcastle for the payment of some interlocutory costs taxed at 5*l.* If the debtor's only means consisted of a salary of so moderate an amount that he could only pay by monthly instalments of say 1*l.*, the debtor would have to be brought up to London for examination as to his means, if the judge of the county court had no jurisdiction.

Another difficulty which has been suggested is that there is no provision for suspending the right of issuing a writ of execution, when an order for payment by instalments is made by a county court on a judgment of the High Court. This argument is, however, rather specious than practical. In practice application is only made for payment by instalments when the ordinary methods

(1) 1 C. P. D. 169.

of execution are unavailable or unproductive, and if execution should be levied after the making of an order for payment by instalments—a very unlikely occurrence—the county court could refuse to enforce the order. A similar difficulty, if real, would affect the High Court as well as the county court, for an order of the High Court to pay by instalments does not take away the right to levy execution.

The remedy, if one should be needed, which has not as yet been found to be the case, would be to make a general rule forbidding the issue or levying of execution after an order for payment by instalments has been made.

In this case the debtor had agreed to pay the debt by instalments of 1*l.* a month, and the learned judge should have made an order accordingly. As, however, he refused to do so, a summons was taken out before me, not by way of appeal, but in order that I might exercise the concurrent jurisdiction which I undoubtedly possess. When, however, the sum due and the amount the debtor is able to pay monthly are so small as they are in this case, it is my practice to refer the parties to the county court, because the cost of enforcing in the High Court an order for the payment of a monthly instalment of 1*l.* would amount to very nearly three times the amount of the instalment.

In this case, moreover, the debtor does not reside within the London bankruptcy district, and if I were to make this order, and the debtor were to fail to comply with it, he would be dragged up from Brentford to the Royal Courts of Justice to undergo an examination as to his means which could be made more cheaply and more efficiently at Brentford, where he resides and is known.

I regret very much the trouble to which the creditor has been put; but I think the most convenient course will be to dismiss the present application, and to direct the creditor to renew his application to the county court, when I have no doubt the learned judge will make the order for payment by monthly instalments of 1*l.* to which the parties have agreed.

In the second case the facts are similar to the first, except that the original order was an order of the High Court in Bankruptcy of the 19th of August, 1885, dismissing Addington's petition for

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adjudication against Ives, and ordering by consent that Ives should pay Addington the sum of 25*l.*, the agreed costs, on or before the 19th of September, 1885.

The only effect of this order, which was made by consent, is to give Ives a month before any steps could be taken to enforce payment of the costs. The Court had not before it any question as to the defendant's means, nor did it pronounce any decision thereon. Practically the order was held in suspense for a month; but when the month came to an end, the order became a simple unconditional order to pay forthwith.

In this case also the debtor consented to an order for payment by instalments of 1*l.* a month, and I must adopt the same course as in the other case, and I have no doubt that a renewed application to the Brentford County Court will be successful.

Judgment accordingly.

Solicitor for the judgment creditor: *Sherrard.*
The judgment debtor in person.

R. B. R.

[IN THE COURT OF APPEAL.]

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Jan. 28.

IN RE G. B. B. NORMAN.

Practice—Costs—Solicitor—Taxation—Lapse of Twelve Months since Delivery of Bill—"Special Circumstances"—6 & 7 Vict. c. 73, *s.* 37.

The "special circumstances" which, under 6 & 7 Vict. c. 73, s. 37, allow a solicitor's bill of costs to be referred for taxation, although twelve months have elapsed since it was delivered to the client, are not merely pressure and overcharge, or overcharge amounting to fraud. A judge has a discretion in ordering the bill of costs to be taxed, if it contains items unreasonably large, or charges requiring explanation, or gross blunders.

Semble, that the same principle ought to be applied to the taxation of a bill of costs which has been paid.

In re Boycott (29 Ch. D. 571) commented on.

Bills of costs delivered by a solicitor contained the following charges: 735*l.* for the costs of a reference, lasting six days: 83*l.* for witnesses' expenses, none of which had been paid by the solicitor, but nearly the whole of which had been paid by the client: and 71*l.* for shorthand notes of the proceedings at a reference where no professional shorthand writer had been employed, but the clerk to the solicitor had taken the notes, and it did not appear that the solicitor had given his clerk any part of the 71*l.* charged. More than twelve months had elapsed since the bills were delivered:—

Held, that these charges constituted "special circumstances" within the meaning of 6 & 7 Vict. c. 73, s. 37, which justified a judge in referring the bill for taxation.

THIS was an application by E. W. Bradwell for the taxation of three bills of costs delivered by G. B. B. Norman respectively on the 1st of October, 1881, on the 15th of March, 1883, and on the 10th of October, 1884, and amounting respectively to 101*l.* 8*s.* 6½*d.*, 900*l.* 9*s.* 1*d.*, and £58 2*s.* 10*d.*

G. B. B. Norman was a solicitor of the High Court, and had acted for Bradwell in an action which had been referred. The reference lasted six days. In the bills a sum of 735*l.* was charged on account of the costs of the action and reference. The bills contained also a charge of 85*l.* 3*s.* for witnesses' expenses; but no part of this sum had been paid by Norman; almost the whole of it had been paid by Bradwell himself, and the rest had never been paid. In the bills no credit had been given to Bradwell for these payments. The bills also contained a charge of 71*l.* for shorthand notes taken during the reference: Norman did not

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employ a professional shorthand writer, but one of his clerks, to take the notes. The sum of 71*l.* was arrived at by charging 1*l.* 1*s.* a day for the time that the reference lasted, and by adding thereto the cost of the transcript: these charges were the same as if a professional shorthand writer had been employed. There was no affidavit by Norman that he had paid his clerk any part of the 71*l.*

Stephen, J., having ordered a taxation, his decision was affirmed by the Queen's Bench Division (Mathew and A. L. Smith, JJ.).

Norman appealed.

Jan. 27, 28. *Crump, Q.C.* (*James McConnell*, with him), for Norman. The rule as to taxation of a solicitor's bill after payment laid down by Cotton, L.J., in the case of *In re Boycott* (1), ought to be extended to taxation after twelve months have elapsed from the delivery of a bill of costs: no difference ought to exist as to the principle applicable to the two classes of cases. That rule is, "that in order to justify the taxation of a bill after payment, there must be pressure and overcharge, or overcharge amounting to fraud." In the present case there has been no pressure and no overcharge amounting to fraud. *Re Pugh* (2), and *In re Lacey & Son* (3) are authorities to the same effect as *In re Boycott.* (4) There are no "special circumstances" in the present case to justify a taxation.

Sills, for E. W. Bradwell, was not called upon to argue.

LORD ESHER, M.R. This is a case as to certain bills of costs of a solicitor which are now more than twelve months old; that is to say, more than twelve months have elapsed since they were delivered. The client requires them to be taxed. Can it be made out that he is entitled to have them taxed under s. 37 of 6 & 7 Vict. c. 73? By one of the clauses in that section it is provided that when twelve months have elapsed since the bill was delivered, it is not to be taxed "except under special circumstances, to be proved to the satisfaction of the Court or judge to whom the application for such reference" to taxation "shall be made." The question is, whether "special circumstances" exist

(1) 29 Ch. D. 571, at p. 576.
(2) 32 Beav. 173.
(3) 25 Ch. D. 301.
(4) 29 Ch. D. 571.

in the present case, which will allow the bill to be taxed. It has been argued that an interpretation has been put upon these words, and that at least after payment of the bill these words "special circumstances" must be confined to the cases of pressure and overcharge, or overcharge amounting to fraud. Taxation after payment is dealt with by s. 41 of 6 & 7 Vict. c. 73. In my opinion no one has a right to put such a limitation upon the meaning of these words as has been suggested: therefore, even if the application to tax be made after payment, I should say that no long series of authorities could warrant such an interpretation as has been relied upon. Pressure and overcharge, or overcharge amounting to fraud, are no doubt "special circumstances," but they are not the only instances, in which a bill may be referred to taxation. We have been pressed with the opinion of Cotton, L.J., in the case of *In re Boycott*. (1) The authority of the Lord Justice is very high: but the Lords Justices who were present at the argument declined to agree with him, even as to what the rule is when the application to tax is made after payment. In courts of equity the judges are judges of fact as well as of law, and when a judge of those courts has laid down a rule of conduct, his successors have usually followed it; but a rule of conduct is not a conclusive authority, binding his successors in the decision of questions of fact; it is decisions upon questions of law which are binding. I adopt the reasoning in the judgment of Bowen, L.J., in that case. I think that the legislature has adhered to the view that "special circumstances" may arise from time to time, as to which a judge is entitled to use his discretion whether a bill of costs is to be taxed, and I think that he may exercise that discretion, whether the bill of costs has or has not been paid. Bowen, L.J., seems to me to be quite right, when he says in *In re Boycott* (2): "Special circumstances, I think, are those which appear to the judge so special and exceptional as to justify taxation. I think no Court has a right to limit the discretion of another Court, though it may lay down principles which are useful as a guide in the exercise of its own discretion." Therefore, even if the bills of costs had been paid, I should not consider myself bound by any hard and fast line: whether a bill

(1) 29 Ch. D. 571, at p. 576 (2) 29 Ch. D. 571, at p. 579.

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is to be taxed, is a matter to be determined by all the facts relating to the bill in each case. Acquiescence does not necessarily deprive the client of his right to taxation. In the present case I do find "special circumstances:" the amount of the charges is very large, almost frightful: a gross blunder has been committed: no money was paid to the witnesses by the solicitor, it was all paid by the client: at the very least the same figures should have appeared on the other side of the account, and the client should have been credited with the amount paid by him. Then there is the charge for shorthand notes: no professional shorthand writer was employed, but only a clerk in the solicitor's office. The solicitor was not entitled to make the same charges as if a professional shorthand writer had been engaged; and I believe that the amount charged for shorthand notes would not have been paid to the clerk. To sum up the material facts, there were very large bills of costs, a gross blunder, and a very extraordinary charge: these circumstances do amount to "special circumstances" within the meaning of the statute, and I think that the bills of costs ought to be taxed.

LINDLEY, L.J. I am of the same opinion. This is not an application to tax a bill of costs after payment; and the delay of more than twelve months which has happened may be explained. Unless we are driven by authority to say that we must put a limited construction upon the words "special circumstances," we ought not to restrict their natural and ordinary meaning. The decisions in Chancery have proceeded upon a more narrow interpretation than those at common law. I may refer to the decision of the Court of Exchequer in *In re Robinson.* (1) In that case it was the unanimous opinion of the judges present upon the bench that "an unusual charge of a large amount requiring explanation to justify it, was sufficient ground for referring the bill to taxation, even after the expiration of the twelve months." It is a case, however, in which there might have been a difficulty, if the construction followed in courts of equity had been adopted also in courts of common law; but since the coming into operation of the Supreme Court of Judicature Acts, 1873, 1875, the same interpretation ought to be adopted in all the branches of the High

(1) Law Rep. 3 Ex. 4.

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Court, and we must say now what is the true construction of the words "special circumstances." I agree with what has been said by Bowen, L.J., in the case of *In re Boycott.* (1) It is not right so to limit the expression "special circumstances," as to exclude from it unforeseen combinations of facts. To do so is to impose upon Courts greater fetters than the legislature has thought fit to impose on them. The combination of circumstances here is very striking. The amount of the bills is really monstrous; then there is the charge of 85*l.* 3*s.* for witnesses' expenses. I do not see how that amount came to be entered in the bill; but if inserted, there ought to be a corresponding entry upon the other side of the account to the credit of the client. Then the charge of 71*l.* for shorthand notes requires explanation. Without imputing fraud to Mr. Norman, I think that in the present case there are "special circumstances," which require the bill to be taxed, although more than twelve months have elapsed since it was delivered.

LOPES, L.J. The statute uses the words "special circumstances." Those are wide, comprehensive, and flexible words, and I think that the legislature intended them to be so, and that no Court can or ought to lay down any exhaustive definition of them. Charges which in one case would be special circumstances, in another would not be such. It is for the discretion of the judge to say what are special circumstances in a particular case. I cannot express my meaning better than by adopting the words of Bowen, L.J. in *In re Boycott* (2) when he said: "Special circumstances, I think, are those which appear to the judge so special and exceptional as to justify taxation. I think no Court has a right to limit the discretion of another Court, though it may lay down principles which are useful as a guide in the exercise of its own discretion. It seems to me to be the true view of the statute, that there must be special circumstances making the payment differ from an ordinary payment, and that the judge thereupon has a discretion as to whether they are sufficient to authorize taxation." That is entirely in accordance with my view, and expresses what I desire to convey. As to this

(1) 29 Ch. D. 571. (2) 29 Ch. D. 571, at p. 579.

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case, I will only say that there are "special circumstances," which justified the Queen's Bench Division in exercising their discretion and ordering a taxation. I do not think it necessary to go into the cases.

Appeal dismissed.

G. B. B. Norman, in person.

Solicitors for *E. W. Bradwell: Dod, Longstaffe, Son, & Fenwick.*

J. E. H.

March 4.

TRYON *v.* THE NATIONAL PROVIDENT INSTITUTION.

Practice—Parties, Non-joinder of—Addition of Party as Plaintiff—Consent—Order XVI., rr. 2, 11.

A person cannot be added as a plaintiff without his consent in writing, even although he be indemnified against costs.

APPEAL from the decision of Field, J., at chambers, refusing to make an order for the addition of a party as plaintiff.

The plaintiff sued as trustee in bankruptcy of the estate and effects of one Tricks upon a life policy effected by him with the defendants. Tricks had assigned the policy to one Charles by deed of mortgage to secure a sum of 1500*l.* The assignee of the policy had proved in the bankruptcy for the balance of his debt after deducting the value of the security, which he assessed at 45*l.* The trustee gave notice to the assignee of his intention to redeem the policy by payment of the value at which it had been assessed. It appeared that at the time when the assignee of the policy put in his proof the bankrupt was dead, having committed suicide, of which fact the assignee was not aware. Having since become aware of the bankrupt's death, he declined to hand over the policy, and applied to the Bankruptcy Court for leave to withdraw his proof and file a fresh one, or to amend his proof, but such application was refused. The trustee then tendered to the assignee the amount at which he had valued the policy, and of a premium subsequently paid by him, and the assignee handed over the policy and the mortgage deed to the trustee, in exchange for such amount. There appeared to be a provision invalidating the policy in the event of suicide by the assured, except with

regard to the interest of an assignee for value. The plaintiff, being advised by counsel that under the circumstances he should join the assignee as a co-plaintiff in the action, applied to him to allow his name to be added, offering to indemnify him against costs. He refused to allow his name to be added, and an application was made at chambers that his name might be added upon the plaintiff's depositing in Court such sum as might be thought proper by way of securing to him an indemnity against costs.

Field, J., on appeal from the decision of the master, refused to order that the assignee of the policy should be added as plaintiff without his consent, against which refusal the plaintiff appealed.

Charles, Q.C., and *Ryland*, for the plaintiff. The terms of Order XVI., r. 2, enable the Court or a judge to order the addition of any person as plaintiff on such terms as may be just. When the party whom it is sought to add is amply indemnified against costs, it is not reasonable that his consent should be necessary. The terms of Order XVI., r. 11, which prohibit the adding of a person as plaintiff without his consent, cannot have been intended to apply to such a case.

Duckett v. *Gover* (1) is an authority to shew that where a proper indemnity is given consent is not necessary. [They also cited *Turquand* v. *Fearon*. (2)]

Austin, for the assignee of the policy, shewed cause. Rules 2 and 11 of Order XVI. must be read together, and the latter rule distinctly and positively provides that a party shall not be added as plaintiff without his consent in writing thereto.

In *Mason* v. *Harris* (3) the Master of the Rolls explained that he had not decided in *Duckett* v. *Gover* (1) that a person could be added as plaintiff without his consent. *Jackson* v. *Kruger* (4) is a distinct authority to shew that a person cannot be added as plaintiff without his consent.

He also cited *Cormack* v. *Grofrian*. (5)

Wood Hill, for the defendants, stated that they did not resist the application.

(1) 6 Ch. D. 82.
(2) 4 Q. B. D. 280.
(3) 11 Ch. D. 97, at p. 106.
(4) 52 L. T. 962.
(5) W. N. 1876, p. 22.

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Charles, Q.C., in reply. The point now under discussion did not arise in *Jackson* v. *Kruger*. (1) In that case the application was by the defendant to stay proceedings until a person was joined as co-plaintiff, or in the alternative as co-defendant.

MATHEW, J. I am of opinion that this appeal must be dismissed. It is a conclusion to which I come with reluctance, for I cannot see any reason why the provision in the rule upon which the counsel opposing the application relies should apply to a case in which an indemnity is given. Nor was he able to suggest any such reason. Nevertheless, the words of Order XVI., r. 11, positively direct that no person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. It seems to me, looking to the terms of that rule, that my Brother Field's decision was right. If rule 2 of Order XVI. had stood alone, it would have enabled us to order that a party should be added as plaintiff without his consent upon such terms as might seem just, which of course would include an indemnity as to costs. But we must construe that rule in conjunction with rule 11, and I see no way out of the clear and positive provision of the latter rule, which makes the consent of the party to be added as plaintiff in all cases necessary.

A. L. SMITH, J. I am of the same opinion. This is not a case where one person seeks to sue in the name of another upon giving an indemnity as to costs, but a case where it is sought to join a person as plaintiff after the commencement of the action. By the provisions of the Common Law Procedure Act, 1852, s. 35, the consent of the person to be joined as plaintiff was necessary. The 2nd rule of Order XVI., if taken alone, would seem to entitle the Court or a judge to order that a person should be added as plaintiff without his consent on such terms as might seem just but rule 11 appears in plain terms absolutely to prohibit the joinder of a person as plaintiff otherwise than by his consent. With regard to the cases cited, the case of *Duckett* v. *Gover* (2), as explained in the case of *Mason* v. *Harris* (3), so far from being

(1) 52 L. T. 962. (2) 6 Ch. D 82.
(3) 11 Ch. D. 97, at p. 106.

an authority in favour of the plaintiff, is an authority against him, because in the latter case the Master of the Rolls said that he never intended to decide in *Duckett* v. *Gover* (1) that consent was not necessary, and that the consent of the party added in that case had been obtained. *Turquand* v. *Fearon* (2) is not really an authority on the point now in question, because there the party sought to be added had neither consented, nor had he been offered an indemnity.

Appeal dismissed

Solicitors for plaintiffs: *Clarke, Woodcock, & Ryland.*

Solicitors for the defendants: *Davidson & Morriss.*

Solicitors for *Charles*: *Robinson, Preston, & Stow, for C. Wintle.*

E. L.

RICE *v.* HOWARD AND ANOTHER.

March 26.

Practice—Trial—Evidence — Hostile Witness — Discretion of Judge to allow Witness to be treated as hostile—Jurisdiction of Court to review Judge's Discretion—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 22.

At the trial of an action the defendant's counsel, in order to shew that a witness called by him was hostile, and to obtain leave to treat him as such under s. 22 of the Common Law Procedure Act, 1854, asked the judge to look at an affidavit made by the witness in a former action. The judge, being of opinion that there had been nothing in the witness's demeanor, or in the way he had given his evidence, to shew that he was hostile, refused to look at the affidavit:—

Held, on motion for a new trial, that the discretion given to the judge under s. 22 of the Common Law Procedure Act, 1854, was absolute, and the Court had no jurisdiction to review his decision.

MOTION for a new trial in an action tried before Lord Coleridge, C.J., and a special jury, at the Michaelmas Sittings, 1885, in Middlesex.

The action was brought to recover 893*l.*, the balance alleged to be due from the defendants to the plaintiff on certain promissory notes.

The defendant, Lees, appeared and defended the action.

The other defendant, Howard, allowed judgment against him to go by default.

The case made by the plaintiff at the trial was, in substance,

(1) 6 Ch. D. 82. (2) 4 Q. B. D. 280.

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that the defendants were, at the time the promissory notes were given, engaged as partners in carrying on the business of a proprietary club, called the Albany Club; that between the 23rd of June, 1883, and May, 1884, the plaintiff advanced various sums of money to the partnership, for which sums Howard gave promissory notes signed by himself alone and payable by instalments with interest as therein mentioned; that at the time of action brought there was due from the partnership on those promissory notes a balance of 193*l.*; that in May, 1884, the plaintiff made further advances to the partnership for which he took a promissory note for 700*l.* signed by Lees and Howard jointly, and payable by instalments, with a provision that, if any instalment should remain unpaid after the time specified in the note for payment thereof, the whole amount of the note should become due, and that at the time of action brought one of the instalments on that note did so remain unpaid. On behalf of the defence, among other witnesses, counsel for Lees called the defendant, Howard, and examined him in chief with the view of shewing that the only debt due to the plaintiff from the partnership was that in respect of which the joint promissory note for 700*l.* had been given, and that the other promissory notes were in respect of loans advanced to Howard on his own account solely, and not on account of the partnership. The evidence given by Howard being in conflict with that view, counsel for the defendant Lees asked leave to treat Howard as a hostile witness, and, in order to shew that he was hostile, asked Lord Coleridge, C.J., to look at an affidavit made by Howard in an action in the Chancery Division for a dissolution of the partnership, in which affidavit he had sworn that the only partnership debt due to the plaintiff was that in respect of which the promissory note for 700*l.* had been given. Lord Coleridge, C.J., being of opinion that there had been nothing in the witness's demeanor, or in the way he had given his evidence, to shew that he was hostile, refused to look at the affidavit, which, the learned judge said, was not tendered as evidence on any of the issues between the parties to the present action.

The jury found a verdict for the plaintiff against the defendant Lees for the sum of 193*l.*, the balance due on the promissory notes

signed by Howard alone, and found a verdict for the defendant Lees on the claim for 700*l.*, on the ground that no instalment remained unpaid, when the action was brought, on the promissory note signed by both defendants.

The motion for a new trial was on the ground (inter alia) "that the learned judge improperly refused to allow a witness called by the defendant (Lees) to be treated by him as a hostile witness."

Gainsford Bruce, Q.C., and *R. E. Melsheimer*, for the defendant, Lees. The learned judge at the trial ought to have looked at the affidavit in order to inform his mind whether or not the power given by s. 22 of the Common Law Procedure Act, 1854 (1), should be exercised. In *Pound* v. *Wilson* (2) and *Cresswell* v. *Jackson* (3) a similar course was taken.

[STEPHEN, J. In *Greenough* v. *Eccles* (4), where it was held that "adverse" in s. 22 means "hostile," the Court seem to have thought that the matter was entirely in the discretion of the judge at the trial.]

The discretion is a judicial discretion and subject to review. In criminal cases a judge frequently refers to the depositions in order to determine whether a witness may be treated as hostile by the party calling him, and in many other instances the judge looks at matters not strictly in evidence in order to determine in what way he shall exercise his discretion upon questions arising incidentally at the trial.

[*McCall*, as amicus Curiæ, mentioned *Vestry of St. Leonards, Shoreditch* v. *Stimson* (not reported) decided in 1878, and said that in that case Field, J., refused to look at a letter tendered for the same purpose as the affidavit here, and that the Exchequer

(1) 17 & 18 Vict. c. 125, s. 22: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

(2) 4 F. & F. 301.

(3) 4 F. & F. 3.

(4) 5 C. B. (N.S.) 786; 28 L. J. (C.P.) 160.

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Division refused a rule for a new trial on the ground that no appeal would lie from the judge's decision under ss. 22 and 23 of the Common Law Procedure Act, 1854.]

Willis, Q.C., and *J. J. Sims*, for the plaintiff, were not heard.

GROVE, J. I am of opinion that this motion must be refused. The first point made for the defendant is that the Lord Chief Justice was wrong in refusing at the trial to look at an affidavit made in a Chancery suit by a witness called by the defendant. It was said that the affidavit contradicted the witness's evidence given at the trial, and that the learned judge ought to have looked at it in order to see whether or not he was hostile. It would be a very nice question, and one upon which I should entertain great doubt, whether the judge, where there is nothing in the witness's demeanor to shew that he is hostile, ought to receive extraneous evidence of the kind tendered in the present case for the purpose of determining whether he is hostile or not. It may be argued, on the construction of s. 22 of the Common Law Procedure Act, 1854, that the power of the judge to allow the party producing a witness to prove that he has made at other times a statement inconsistent with his present testimony is conditional upon the case previously mentioned in that section, namely, "in case the witness shall in the opinion of the judge prove adverse." If that were the true construction, it might obviously lead to great injustice in many instances, because the party producing the witness could only shew that he was adverse by shewing that he had previously made inconsistent statements. But we have not to decide that question. I think it is clearly a question for the judge only to determine. The language used by Williams, J., in *Greenough* v. *Eccles* (1) seems to shew that he considered that the exercise of the power given by the statute to allow or disallow a witness to be treated as hostile was wholly in the discretion of the judge. He says: "Whatever is the meaning of the word 'adverse,' the mere fact of the witness being in that predicament is not to confer the right of discrediting him in this way. The section obviously contemplates

(1) 5 C. B. (N.S.) 786; 28 L. J. (C.P.) 160.

that there may be cases where the judge may properly refuse leave to exercise the right, though in his opinion the witness prove adverse. And as the judge's discretion must be principally, if not wholly, guided by the witness's behaviour and language in the witness-box (for the judge can know nothing judicially of his earlier conduct), it is not improbable that the legislature had in view the ordinary case of a judge giving leave to a party producing a witness who proves hostile to treat him as if he had been produced by the opposite party so far as to put to him leading and pressing questions, and that the purpose of the section is to go a step further in this direction by giving the judge power to allow such a witness to be discredited, by proving his former inconsistent statements as if he were a witness on the other side." Willes, J., in the same case, goes further: "Moreover, even if the Lord Chief Justice had been wrong, I should have been, as at present advised, of opinion that we have no jurisdiction to review that ruling. In order, no doubt, to prevent the increase of causes of new trial, the legislature have, as it appears to me, in terms made the opinion of the judge upon this point absolute, and therefore final." We have also been referred to a case, decided in 1878, by the Exchequer Division, which appears to have been almost identical with the present case, where the Court are said to have refused to review the discretion exercised by Field, J. We have, therefore, the authority of that case, and the strong dictum of Willes, J., in *Greenough* v. *Eccles* (1), to support the view that this Court has no jurisdiction to review upon any ground the discretion exercised by the judge at the trial. There are good reasons why this should be so; a judge has to exercise his discretion in many instances with respect to what may be termed preliminary or interlocutory questions arising during a trial. If it might be made ground for a new trial that the matter upon which he so exercised his discretion had not been strictly proved before him, for instance, if he had looked at the affidavit in the present case, and it had not been strictly proved before him, he would be greatly hampered in the exercise of his discretion, and the result would be greatly to increase applications for new trials. I agree with the opinion indicated

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by Willes, J., in *Greenough* v. *Eccles* (1), and I am therefore of opinion that the decision of the Lord Chief Justice in the present case was final, and cannot be reviewed.

STEPHEN, J. I am of the same opinion.

THE COURT refused to grant a new trial upon the other grounds mentioned in the notice of motion.

Motion dismissed.

Solicitor for plaintiff: *B. A. R. D. Moore.*
Solicitors for defendant: *Taylor & Taylor.*

W. A.

March 31;
April 1.

READING *v.* SCHOOL BOARD FOR LONDON.
C. HOPKINSON & SONS, CLAIMANTS.

Practice—Interpleader—Power to interplead as to Part only of a single Claim—1 & 2 Wm. 4, c. 58, s. 1—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6—*Order LVII., rr.* 1, 4.

A debtor against whom an action has been brought, and who has had notice of assignment of the debt, may interplead as to part only of the claim, and may dispute the residue. His application for relief may either be made in the action under Order LVII., rr. 1, 4, or by a separate proceeding under s. 25, sub-s. 6, of the Judicature Act, 1873.

If an interpleader order be made on a separate proceeding under s. 25, sub-s. 6, of the Judicature Act, 1873, the judge making the order has no power to stay the proceedings in an action already commenced against the debtor.

APPEAL from an order of A. L. Smith, J., at chambers, on the ground that he had no jurisdiction to make the order.

An action was brought in January, 1886, by the plaintiff Reading, against the defendants to recover 977*l.* 12*s.* for work and labour under one contract; to which they pleaded that 861*l.* 18*s.* was the value of the work done by the plaintiff under the contract as certified by the architect, but that the money was not due under the terms of the contract until May, 1886; as to the balance of 115*l.* 14*s.* they pleaded never indebted. The

(1) 5 C. B. (N.S) 786; 28 L. J. (C.P.) 160.

defendants, who had in October, 1885, received a notice from the claimants of the assignment to them by the plaintiff of the whole of the moneys due to him from the defendants, took out a summons calling upon the plaintiff and the claimants to interplead as to the 861*l.* 18*s.*, "part of a larger sum;" this summons was not a summons in the action pending against the defendants at the suit of the plaintiff, but was wholly independent of that action, and was taken out under s. 25, sub-s. 6, of the Judicature Act, 1873. On that summons the master made no order, but on appeal to A. L. Smith, J., he ordered that the defendants should pay into court the sum of 861*l.* 18*s.* to abide any order that might thereafter be made; that the action of the plaintiff against the defendants should proceed as to 151*l.* 14*s.*, and that an issue should be framed to determine the rights of the plaintiff and the claimants.

Bonsey, for the plaintiff. There is no power to split up a money demand arising from one cause of action under one contract, and to interplead as to a portion. The party seeking to avail himself of the relief given by the interpleader procedure cannot do so if he does not admit the debt; it is essential that he be in the position of a mere stakeholder who asserts no interest of his own in the fund. This was the rule in equity before the Common Law Procedure Act, 1860: *Diplock* v. *Hammond* (1), where it was held that the plaintiff, who admitted owing only 325*l.* out of an assigned claim against him of 365*l.*, could not maintain a bill of interpleader: *Mitchell* v. *Hayne.* (2) This rule was followed in the Common Law Courts: *Patorni* v. *Campbell* (3); *Slaney* v. *Sidney.* (4) It is true that since the Common Law Procedure Act, 1860, it has been held that a Court of Law is not bound by the principles which govern Courts of Equity as to interpleader: *Best* v. *Hayes* (5); but in that case the defendant, an auctioneer, merely sought to deduct the expenses of and commission upon a sale, and claimed no interest in the corpus of the fund. Unless

(1) 2 Sm. & Giff. 141.
(2) 2 Sim. & Stu. 63.
(3) 12 M. & W. 277.
(4) 14 M. & W. 800.
(5) 1 H. & C. 718.

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the party seeking relief admits in its entirety the claim made against him, he is a person who claims an interest in the subject-matter in dispute within the meaning of s. 1 of the Interpleader Act, 1831, and of Order LVII., r. 2.

The judge had no power to stay the action as to the 861*l.* 18*s.*, the interpleader proceedings being independent of the action.

G. G. Greenwood, for the claimants. The Judicature Act, 1873, s. 25, sub-s. 6, first gave to a debtor who had notice of conflicting claims the power to interplead before action brought, it not having been open to him to take such proceedings under the Common Law Procedure Act, 1860, until an action had been commenced against him. But the Judicature Act, 1873, does not apply where an action has been brought; if a defendant wishes to interplead he must do so in the action itself; he cannot plead a denial of liability and then go back and interplead dehors the action. The procedure is under Order LVII., rr. 1, 4.

Douglas Walker, for the defendants, was not called upon.

DAY, J. I have no doubt whatever that my Brother Smith's order was just and equitable, and that he had power to make it. The proper view to take of the interpleader application in my opinion was to consider it as an application wholly independent of the action, although it might well have been made in the action itself. The defendants found themselves in a double difficulty. In the first place the money was not due; they would, however, gladly have paid it to the plaintiff but for the further difficulty which arose in consequence of the notice of the assignment by him to the claimants. These gentlemen did not appear to be willing to concur in any scheme for dealing with the fund; and the defendants were consequently not able to pay either, and as the money was not due they had a defence to the action irrespective of the dispute between the two claimants of the fund; they could not avoid defending the action. Fortunately by the provisions of the Judicature Act, 1873, s. 25, sub-s. 6, a person owing money is at liberty to pay it into court under an interpleader order, and the defendants availed themselves of their power to apply for such

an order. If no action had been pending there would have been no difficulty in the matter, and the two claimants would have contested their right to the sum paid into court, which was in effect the substance of my Brother Smith's order. I am clearly of opinion that he was not deprived of his power of making such an order because an action had been brought against the School Board; there is nothing in the statute to warrant such a contention. It is said on the other hand that if an applicant under this sub-section comes within the category of a person owing money which is said to have been assigned by the person to whom it is due he is entitled to relief, whether an action has been brought against him or not; and this contention is in my opinion right.

The only thing remaining to be noticed is, that my Brother Smith stayed the action; I think that he should not have done so, seeing that the application at chambers was not made in the action, but was wholly independent of it. The order should be amended by striking out all reference to the defendants in the action, so that the action shall go on if the parties wish it; and the defendants must have their costs of the proceedings in chambers up to the interpleader order, such costs to be deducted out of the fund paid into court.

WILLS, J. I am of the same opinion. Although I think it is to be regretted that the summons was not taken out in the action, as it might have been, there seems to me to be no difficulty in allowing the defendants to interplead as to a part of the claim against them. It is said that we are precluded from relieving a defendant as to a portion of a larger claim, because in equity interpleader would not be allowed under such circumstances. If that is the rule in equity, I am happy to think that under the new rules there is no reason for us to apply it. It may be that, because s. 1 of the Interpleader Act contains the expression, "shewing that such defendant does not claim any interest in the subject-matter of the suit," it is sufficient for a plaintiff to make an unjust demand for a larger sum than is due to him in order to defeat interpleader proceedings on the part of the defendant; but it is unnecessary for me to express an opinion on such a point,

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which is the logical conclusion of the contention on behalf of the appellants.

All the common law statutes as to interpleader are now repealed, and the right to that class of relief is regulated by Order LVII., by which the old practice of the Court of Chancery is modified. Looking at the language of that order I think that interpleader proceedings are clearly applicable to the present case, and I cannot understand why relief should not be granted as to 86*l.*, and the claim against the defendants satisfied as to that amount because another 115*l.* is said to be due from them; to so hold would be to inflict unnecessary injustice. I agree that the judge at chambers ought not to have stayed the action, and the order must be varied in that respect. It is only reasonable that a person who is willing to pay his real creditor should not be put to costs, and I think that we ought to use the wide power over costs given us by Order LVII., r. 15, in the way indicated by my Brother Day.

Order varied by taking off stay of action; otherwise appeal dismissed.

Solicitor for plaintiff: *A. G. Ditton.*
Solicitors for claimants: *Frank Richardson & Sadler.*
Solicitor for defendants: *Gedge.*

W. J. B.

THE QUEEN ON THE PROSECUTION OF CHARLES COPPING *v.* THE REGISTRAR OF THE COUNTY COURT AT LEEDS AND WILLIAM COPPING. 1886 *March* 16.

County Court—Practice—Notice of Demand for a Jury—Time, Computation of—Fifteen Days before "Return Day"—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42)—*County Court Rules*, 1875, *Order XXXIX. b, r.* 4.

Under Order XXXIX. b, r. 4, of the County Court Rules, 1875,—which directs that notice of a demand for a jury in actions brought under the Employers Liability Act, 1880, shall be given to the registrar of the Court fifteen clear days at least before the return day,—the notice must be given fifteen clear days before the day originally fixed for the return of the summons and not before a day to which the hearing has been adjourned.

Fletcher v. *Baker*, (Law Rep. 9 Q. B. 370) followed.

RULE calling upon the registrar of the County Court of Yorkshire, holden at Leeds, and upon the plaintiff in an action of *Copping* v. *Copping* brought in that court, to shew cause why the registrar should not proceed to summon a jury for the trial of the action pursuant to a notice of a demand for a jury given by the defendant.

It appeared that the action was for compensation under the Employers' Liability Act, 1880. The summons was made returnable on the 14th of May; but on the 1st of May the judge postponed the hearing, by consent, to the 11th of June. On the 16th of May the defendants' solicitors sent to the registrar of the court notice of a demand for a jury, but he declined to summon a jury on the ground that, regard being had to the County Court Rules, 1875, Order XXXIX. b, r. 4 (1), the notice had been given too late.

No application was made to the judge under the County Court Rules, 1875, Order XVI., r. 2 (2), which gives the judge power

(1) County Court Rules, 1875, Order XXXIX. b, r. 4: "Notice of a demand for a jury shall be given in writing to the registrar of the court fifteen clear days at least before the return day, and the summonses to the intended jurors shall be delivered to the bailiff forthwith." This rule may also be cited as rule 16 of County Court Rules, 1880.

Order XLIV., r. 4, of the County Court Rules, 1886, contains a similar provision.

(2) County Court Rules 1875, Order XVI., r. 2: "Where notice of a demand of a jury has not been

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to adjourn the trial of an action when notice of the demand for a jury has not been given in due time.

Y. Anderson, for the registrar, and *Grubbe*, for the plaintiff, shewed cause.

Wormald, for the defendant, in support of the rule.

The substance of the arguments is stated in the judgment of Mathew, J.

MATHEW, J. In my opinion this rule must be discharged. It appears that the registrar of the county court was requested by the defendant in an action under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), to summon a jury for the hearing of the case. By Order XXXIX. b, r. 4, of the County Court Rules, 1875, notice of a demand for a jury in such actions must be given to the registrar fifteen clear days at least before the "return day." In the present case the trial was adjourned by consent, and then more than fifteen days before the day to which it was postponed the defendant gave this notice to the registrar. The registrar refused to summon a jury, and thereupon the defendant obtained this rule, cause against which has been shewn to day on behalf of the registrar and the plaintiff. It must be remembered that the defendant is insisting upon what he alleges to be his strict right to have a jury. It is quite open to him to apply to the discretion of the judge, but he has not done so. The question, therefore, comes before us as a question of an absolute right claimed by the defendant.

Although the present action is brought under the Employers' Liability Act, 1880, the point in dispute would apply to other cases in the county court, for it turns upon the general definition of "return day" given in the interpretation clause of the County Court Rules, 1875. By that clause "'return day' shall mean and include the day appointed by an ordinary summons for the appearance of the defendant, or any other day fixed for the trial

given in due time, or if at the trial both parties desire to try by a jury, the judge may on such terms as he shall think fit, adjourn the action in order that the necessary steps for such trial may be taken, and the trial shall take place accordingly."

A similar power is given by the County Court Rules, 1886, Order XXII., r. 2.

of an action." (1) Now the defendant says that by virtue of the latter part of this definition notice of demand for a jury may be given the specified number of days before any day which may be actually fixed for the trial of the case, although that may not be the day originally fixed. Against that view, it is said that the County Court Rules, 1875, were framed after the passing of the County Courts Act, 1875 (38 & 39 Vict. c. 50), which extended the procedure by a default summons. Under a default summons the defendant is not allowed to defend unless he gives a notice of his intention to do so; and when such a notice is given an obligation is cast upon the registrar to give the defendant notice of the day upon which the action will be tried. Accordingly it has been urged in argument that the latter part of the above definition of "return day" was intended to meet those cases in which a plaintiff proceeds by a default summons instead of by an ordinary summons. I think that that is the right interpretation, and that it was not intended by this fresh provision to alter the procedure under an ordinary summons. Our attention was also drawn to some curious results which would follow if the arguments on behalf of the defendants were correct. Under an ordinary summons a defendant may pay into court the amount claimed "five clear days before the return day," and then it is provided by the County Court Rules, 1875, Order XII., r. 4, that notice of such payment is to be sent by the registrar to the plaintiff. If after the receipt of that notice the plaintiff proceeds with the action, and does not recover a larger sum than that paid into court, he is to pay the defendant the costs incurred by him after such payment into court. It is clear that it was never contemplated that there should be such an extension of time for payment into court as there would be if "return day" meant in such a case any day to which the trial might be adjourned. Again, in actions under the Employers' Liability Act, 1880, where no demand for a jury has been made, a party may "ten clear days at least before the return day," file an application for assessors as provided by the County Court

(1) County Court Rules, 1886, Order LII.: "'Return day' means the day appointed in any summons or proceeding for the appearance of the defendant, or any other day fixed for the trial of any action or matter."

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Mathew, J.

Rules, 1875, Order XXXIX. b, r. 6. If the defendants' contention were correct, the accident of an adjournment might enable a party to obtain a jury after assessors had been appointed. I therefore think that "return day" in Order XXXIX. b, r. 4, means the day fixed by the summons. In this case, therefore, the defendants' demand for a jury was too late, and the rule must accordingly be discharged with costs.

A. L. SMITH, J. The question in this case is whether the defendant's notice of a demand for a jury was given fifteen clear days before the return day, as required by Order XXXIX b., r. 4, of the County Court Rules, 1875. It seems to me clear that although that rule deals with actions under the Employers' Liability Act, 1880, it was not intended to depart in this respect from the procedure in ordinary actions. The practice in actions under the Employers' Liability Act, 1880, is the same as in other actions, except where a variance has been expressly introduced. Therefore "return day" in actions under that Act must have the same meaning as the expression has in ordinary cases in the county court. I am fortified in that conclusion by the heading to the rules under the Act, which provides that they "may be cited as the 'County Court Rules, 1880,' or each rule may be cited as if it had been one of the County Court Rules, 1875, and had been numbered therein by the number of the order and rule placed in the margin opposite each of these rules."

Now, it is said that the County Court Rules, 1875, have altered the practice existing before that year. The first rule which it is necessary to refer to is Order XVI., r. 1, which provides that "notice of demand of a jury shall be made in writing to the registrar of the court three clear days before the day of trial, and the summonses to the intended jurors shall be delivered to the bailiff forthwith." Apart from the definition in the interpretation clause it seems clear that "day of trial" there means the day originally fixed for the hearing. That was laid down in *Fletcher* v. *Baker* (1), where the question arose under rule 104 of the County Court Rules which were in force prior to 1875. In that rule the words were "day of hearing," instead of "day of trial,"

(1) Law Rep. 9 Q. B. 370.

but I think that does not make any substantial difference. It is, however, urged on behalf of the defendant that the definitions of "trial" and "return day" given in the interpretation clause of the rules of 1875 have altered this. I am unable to agree with this suggestion. The definition of "trial" was, I think, intended to mark the distinction between the hearing of a "matter" and of an "action;" and the definition of "return-day" was framed with a view to the mode of procedure by a default summons, which was extended by the County Courts Act, 1875 (38 & 39 Vict. c. 50). In a default summons instead of calling upon the defendant to appear he is simply notified that he may within sixteen days give a notice of his intention to defend the claim. No date is fixed for his appearance; and the phrase "any other day fixed for the trial of an action" in the definition of "return-day" means, I think, the day fixed by the registrar when the defendant to a default summons gives notice of his intention to defend. The question which here arises, is as to the meaning of "return-day" in Order XXXIX b., r. 4, of the rules of 1875. A default summons, it may be observed, is not applicable to a claim under the Employers' Liability Act, 1880. It follows therefore that "return-day" in that rule must mean the same as in the case of an ordinary summons, namely, the day originally fixed for the hearing.

The inconveniences which would arise from a different construction have been pointed out by my brother Mathew, and I agree with him. It is open to the defendant now, if he chooses, to go before the county court judge and ask him to exercise his discretionary power to summon a jury. The rule must accordingly be discharged with costs.

Rule discharged.

Solicitors for the Registrar: *Cooke & Jonas.*

Solicitors for the plaintiff: *Jaques, Layton, & Jaques, for Scatcherd & Hopkins, Leeds.*

Solicitors for the defendant: *Elliott & Ash, for Neill & Broadbent, Bradford*

R. B. R.

1886
Feb. 19.

IN RE WINSLOW. EX PARTE GODFREY.

Bankruptcy—Books of Account—Bankruptcy Rules, 1883, *r.* 259—*Practice.*

The 259th rule of the Bankruptcy Rules, 1883, which provides that "no person shall as against the official receiver or trustee be entitled to withhold possession of the books of accounts belonging to the debtor, or to set up any lien thereon," is to be construed strictly, and will not be extended to vouchers, counterfoils of cheques, books, correspondence, and other papers in the hands of another person, although such documents would be of material assistance to the trustee in preparing his accounts of the bankrupt's estate.

ON the 29th of September, 1884, Dr. Forbes Winslow, under a written agreement with one Fryzer, became yearly tenant of chambers at No. 8, Duke Street, Portland Place.

In August, 1885, arrears of rent being due to Fryzer from Dr. Forbes Winslow, another agreement was entered into between them, under which Dr. Forbes Winslow was to make certain payments and do certain repairs, and Fryzer was to retain all the goods and effects of Dr. Forbes Winslow on the premises until all the provisions of the agreement were complied with.

In November a receiving order was made against Dr. Forbes Winslow, and in December he was adjudicated bankrupt.

On the 17th of December Fryzer delivered up to the official receiver, upon his application, eleven diaries, two ledgers, three cash books, and a fee book, as the only books of account in his possession relating to the affairs of the bankrupt. But there were also at No. 8, Duke Street, five large boxes full of miscellaneous papers and documents of the bankrupt, comprising private correspondence, cheque books, counterfoils of cheques, vouchers, and papers relating to the bankrupt's affairs and accounts. These boxes Fryzer claimed to retain both under his ordinary right of a landlord, and also under the agreement of August, 1885 (which had been broken), until the arrears of rent due to him were paid. He did not prove in the bankruptcy for his debt.

The trustee in bankruptcy now applied to the Court for an order that Fryzer might be ordered forthwith to deliver up to him all books, books of account, cheques, counterfoils, letters, papers, and documents in his possession or power relating to the

bankrupt, his dealings and property. The trustee deposed that he had had inspection of the documents and papers in question, that they were very voluminous, and that they were absolutely necessary to him for the purpose of investigating and preparing the bankrupt's accounts, and ascertaining his position with regard to his transactions with various parties.

Hume Williams, for the trustee. No doubt the rule only says "books of account," but some latitude must be allowed to those words, and in a case like this it is impossible for the trustee to arrive at any accurate statement of account without these documents. He has sworn that they are absolutely essential to him. In *Ex parte Bramble* (1) it was held that the lien of a solicitor was not good as against the trustee in bankruptcy: à fortiori the lien of a landlord who has distrained cannot override the right of the trustee.

J. D. Fitzgerald, for Fryzer. The expression "books of account" must mean documents in which accounts are kept by persons who carry on a profession such as that of the bankrupt, and does not apply to private correspondence, old cheque books, and vouchers, although they may be of use in preparing an account. The trustee must shew that these documents are "books of account" properly within the rule. These documents may be of value to the trustee, but the distress was insufficient to satisfy all the rent that was due. Fryzer is quite willing to give up these boxes on being paid the balance of rent due to him. Substantially the same question arose in *In re Capital Fire Insurance Association*. (2)

Hume Williams, in reply.

CAVE, J. I am of opinion that this application must be refused. The trustee comes to this Court and asks under rule 259 for the books of account of the bankrupt. The respondent says: "I have no books of account. I have delivered them up to you." That is a good answer, unless the trustee can shew that the respondent is wrong. The trustee says that the respondent has letters, old cheque books, counterfoils of cheques, and vouchers,

(1) 13 Ch. D. 885. (2) 24 Ch. D. 408.

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IN RE WINSLOW. EX PARTE GODFREY.

from which an account may be made up. Now the 259th rule is express in its terms. It says "books of account," and no more. It is a very strong rule, and takes away from creditors rights they would otherwise possess. In my opinion it must be limited to books of account, and cannot be extended to documents consisting of cheque books, vouchers, and other papers. They are not within the rule, although, no doubt, they might be very useful to the trustee in making out an account. The motion must be dismissed with costs.

Order accordingly.

Solicitors: *C. J. Cole; Valpy, Chaplin, & Peckham.*

H. L. F.

1885
Nov. 10.

IN RE GARNETT. EX PARTE BULLOCK.

Bankruptcy—Life Interest—Proposal by Trustee to insure Bankrupt's Life—Medical Examination—Bankruptcy Act, 1869, s. 19—*Bankruptcy Act*, 1883, s. 24.

The Court has no jurisdiction under s. 19 of the Bankruptcy Act, 1869 (re-enacted in s. 24 of the Bankruptcy Act, 1883), to compel a bankrupt to answer questions or to submit to a medical examination, for the purpose of enabling the trustee to effect an insurance on the bankrupt's life with a view to increase the saleable value of the bankrupt's life interest in certain property.

THIS was an appeal from the decision of the judge of the County Court of Cheshire, holden at Crewe.

The bankrupt was a widow, about twenty-six years of age, and her only asset was a life interest in a sum of 872*l.* 7*s.* 10*d.*, 3*l.* per cent. Consols. This life interest by itself was of no saleable value, but a purchaser could be found for it at the price of 275*l.* provided it was supported by a policy of insurance on the life of the bankrupt.

On the 4th of August, 1885, an application by the trustee to the county court judge that the bankrupt might be ordered to answer in writing certain questions necessary for the purpose of obtaining a policy of insurance on her life, and might also be ordered to submit to a medical examination for the like purpose, was dismissed with costs. The trustee appealed.

W. E. Ball, for the trustee. The bankruptcy proceedings in this case were instituted under the Act of 1869, and this application is based upon s. 19 of that Act, which, however is re-enacted by s. 24 of the Bankruptcy Act, 1883. The words of the section are wide enough to cover this application, and there is nothing unreasonable in it. It is true that no authority can be found in support of it, but that may be because it has never before been resisted. This life interest is the only asset of the bankrupt, and if the motion is refused there will be no estate for the creditors.

Vaughan Williams, for the bankrupt. There is neither precedent nor authority for this application. The section is confined to the property of the bankrupt, and gives the Court no power over the person of the bankrupt or to compel him to answer such questions as these. In *Walker* v. *Mottram* (1) it was held that on the sale of the goodwill of a bankrupt's business no conditions could be imposed on the bankrupt.

W. E. Ball, in reply.

CAVE, J. I am of opinion that the county court judge was right. The section in question, construed according to its plain meaning, does not authorize the examination of a bankrupt as to his state of health with a view to effect an insurance on his life. That, to my mind, is very different from the matters mentioned in the section and pointed at by the rules. If the legislature had intended anything of that kind, I should have expected to find in the section words distinctly applicable to this particular matter. Moreover, it is admitted that no authority can be found in support of the application. Under these circumstances I am of opinion that I ought not to make a precedent of this kind. The appeal must be dismissed with costs.

Order accordingly.

Solicitors: *Rice & Burnett; C. R. & H. Cuff.*

(1) 19 Ch. D. 355.

H. L. F.

1885
Nov. 10.

IN RE GENESE. EX PARTE DISTRICT BANK OF LONDON.

Bankruptcy—Trader—Husband and Wife—Proof by Wife for Loan out of her Separate Estate—Right to vote and receive Dividends—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 3.

When a married woman seeks to prove under her husband's bankruptcy for money lent by her to him, she must shew that the money was not lent for the purposes of his trade or business.

If she fails to do so, she cannot prove or vote until all the other creditors have been paid 20*s.* in the pound.

THIS was an application to expunge the proof of Sarah Genese, the wife of the bankrupt, for a sum of 384*l.*, alleged to be moneys advanced by her to her husband out of her separate estate.

At the first and second meetings of the creditors, this proof was admitted by the chairman, and she was allowed to vote. The District Bank of London, one of the creditors, appealed against the chairman's decision.

Vaughan Williams, for the appellants. Mrs. Genese, being the wife of the bankrupt, is not entitled either to prove or vote until all the other creditors of her husband have been paid 20*s.* in the pound: the Married Women's Property Act, 1882, s. 3. (1) There has been no decision on this section, but it is in terms the same as s. 5 of Bovill's Act (28 & 29 Vict. c. 86); and it has been held that a lender of money to a trader under that Act cannot prove in competition with the other creditors: *Ex parte Taylor*. (2) The principle of that case applies to the present.

E. C. Willis, Q.C., and *Kisch*, for Mrs. Genese. Bovill's Act was passed for a particular purpose, and does not apply to the present case. Under the old law in bankruptcy a wife could prove and vote: *Ex parte Wells*. (3) The 3rd section of the

(1) 45 & 46 Vict. c. 75, s. 3: "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after but not before all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

(2) 12 Ch. D. 366.

(3) 2 M. D. & D. 504.

Married Women's Property Act, 1882, does not debar Mrs. Genese from proving and voting, although it may be that she is not entitled to participate pari passu with the other creditors. Further, there is no evidence that this money was lent the bankrupt for the purposes of his trade or business, and the burden is on the party objecting to the proof to adduce evidence in support of his contention.

Muir Mackenzie, for the official receiver.

No reply was called for.

CAVE, J. I am of opinion that it is impossible to put on s. 3 of the Married Women's Property Act, 1882, the construction contended for by Mr. Willis. To my mind the decision in *Ex parte Taylor* (1) governs the present case, for I can see no distinction in principle between the 3rd section of this Act and the 5th section of Bovill's Act. As to the other point, that the burden of proof is on the party objecting to shew that the money was lent by the wife for the purpose of the bankrupt's trade or business, I am of opinion that it is for the wife to shew for what purpose she lent her husband the money. The natural inference would be that she lent him the money for the purpose of his trade or business. I think, therefore, that it rests with her to prove the contrary. In this case Mrs. Genese has not done so. The motion, therefore, must be allowed with costs.

Order accordingly.

Solicitors: *Wright & Son; A. E. Rosenthal; W. W. Aldridge.*

(1) 12 Ch. D. 366.

H. L. F.

1885
Nov. 9, 16.

In re GILLESPIE. Ex parte ROBARTS.

Bill of Exchange—Bill drawn Abroad upon Acceptor in England—Bankruptcy of Acceptor—Proof for Re-exchange—Measure of Damages—Law of Tobago—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 57 (*subs.* 2), 97.

Section 57 of the Bills of Exchange Act, 1882, is intended to describe the damages which may be treated as liquidated damages for the purpose of being specially indorsed on a writ, when the drawer of a dishonoured bill desires to proceed under Order XIV. of the Rules of the Supreme Court, 1883. It does not deprive the drawer of the right to recover from the acceptor any special damage of an unliquidated character which he can shew that he has sustained.

It is still, therefore, the law, as laid down in *Walker* v. *Hamilton* (1 D. F. & J. 602) and *In re General South American Co.* (7 Ch. D. 637) that the drawer of a bill of exchange in a foreign country accepted in England is entitled, upon the bill being dishonoured and protested, to recover from the acceptor, not only the amount of the bill with interest, but also all such reasonable expenses as may have been caused by the dishonour, including the expenses of re-exchange.

On the 6th of February, 1884, the executors of F. Keens, in the island of Tobago, drew six bills, of 500*l.* sterling each, upon A. M. Gillespie & Co., of London, who duly accepted the same. The bills were made payable in London three months after sight to the order of Mrs. Emma Horsford, and were indorsed over by her for value.

Before the bills fell due A. M. Gillespie & Co. became bankrupt, and the bills were remitted to Tobago, and were paid by the drawers.

On the 22nd of June, 1885, the drawers, through F. Roberts, their attorney in London, proved in the bankruptcy for the amount of the bills, and also for the following items:—

	£	*s.*	*d.*
Notarial expenses	4	4	0
Commission	7	10	0
Ten per cent. re-exchange on bills not paid—			
3000*l.*	300	0	0
	311	14	0

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IN RE GILLESPIE. EX PARTE ROBARTS.

The drawers claimed to be entitled to prove for these items by the law of Tobago. (1)

The trustee having rejected their proof to the extent of the 311*l.* 14*s.*, on the ground that that amount was not a proveable debt in the bankruptcy, they appealed from his decision.

Nov. 9. *H. Reed*, for the appellants. The question turns on the construction of s. 57 of the Bills of Exchange Act, 1882. Before that Act the appellants could have proved for this re-exchange: *Francis* v. *Rucker* (2); *Walker* v. *Hamilton* (3); *In re General South American Co.* (4); and s. 57 does not alter the law in this respect. That section does not contain a complete code for every case in which a bill has been dishonoured abroad, but only enumerates instances in which the measure of damages may be treated as liquidated damages, and does not negative the right of the injured party to recover all reasonable expenses. The words "in lieu of" the above damages in sub-s. 2 of the section should be read "in addition to."

Cohen, Q.C., and *Yate Lee*, for the trustee. The only damages for which the appellants can prove are those specified in the 57th section of the Act, which expressly provides for this case.

[CAVE, J., referred to s. 97 of the Act.]

No doubt that section contains important savings, but the contention of the appellants is inconsistent with the express enactments of the 57th section. Further, this is not a case of re-exchange at all. Re-exchange arises where a person here accepts a bill payable abroad and makes default, then the person

(1) The Act (23 Vict. c. 3) of the Island of Tobago, entitled "An Act respecting Damages on Bills of Exchange," enacts: "On any bill of exchange returned to this island duly protested to the prejudice of any merchant, trader, or other person whomsoever, it shall be lawful to and for any person so prejudiced to demand and receive damages at and after the rate of ten pounds for every one hundred pounds together with interest, and the expense of noting and protesting; and on an action to be commenced under the Act 22 Vict. c. 10, or under the Common Law Procedure Act, the plaintiff shall be at liberty to indorse a claim for such damages on the writ of summons in addition to the other claims authorized to be indorsed, and such amount indorsed for damages shall be taken as a liquidated debt." . . .

(2) Amb. 671.

(3) 1 D. F. & J. 602.

(4) 7 Ch. D. 637.

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injured is entitled to prove for the difference between the English and foreign currency. There is no difference in this case between the amount of the original bill and the amount payable in London. *Napier* v. *Schneider* (1), *Suse* v. *Pompe* (2), and *Woolsey* v. *Crawford* (3) are directly in point.

Reed, in reply. The rights of the appellants are saved by the 97th section of the Act, and they are entitled to prove for the reasonable expenses they have incurred: *Prehn* v. *Royal Bank of Liverpool.* (4)

Cur. adv. vult.

Nov. 16. CAVE, J. In this case the appellants proved for a debt against the estate of the bankrupts arising on certain bills of exchange, with reference to which no point arises. They also claim to prove for what is called the re-exchange on those bills at the rate of 10 per cent., being the amount fixed by the statute of the Island of Tobago, where the bills were drawn and indorsed.

The first question is, whether previous to the Bills of Exchange Act, 1882, damages of this kind could be recovered by the drawer from the acceptor. Now the cases are somewhat numerous, and they are not altogether to the same effect; but after the decision in *Walker* v. *Hamilton* (5) it seems to me impossible to hold that such an action—that is to say, an action for damages on the re-exchange—could not have been maintained against the acceptor. The cases are all dealt with in the judgment there, and it is expressly laid down that the drawer is entitled to maintain such an action against the acceptor. That is the decision of the Court of Appeal. It was followed without hesitation by Malins, V.C., in *In re General South American Company* (6), and the other cases which appear at first sight to be contrary, are there explained and distinguished. Then comes the Bills of Exchange Act, 1882, and the first provision to which it is important to call attention is s. 97, which provides (sub-s. 2) "that the rules at Common Law, including the Law Merchant, save in so far as they are inconsistent with the express provisions of this

(1) 12 East, 420.
(2) 8 C. B. (N.S.) 538.
(3) 2 Camp. 445.
(4) Law Rep. 5 Ex. 92.
(5) 1 D. F. & J. 602.
(6) 7 Ch. D. 637.

Act, shall continue to apply to bills of exchange, promissory notes, and cheques." It therefore follows, unless there is something in the Act expressly inconsistent with the ancient law, that the right to prove for damage of the kind which I have spoken of still exists. A reference was made to s. 57 of that Act which provides that "where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows: (1.) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—(a) The amount of the bill: (b) Interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case: (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest; 2. In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment." Now, in the first place, the re-exchange which is mentioned there is not the re-exchange we are dealing with here. The re-exchange which is mentioned there is merely the amount of English currency which is represented by the bill in the case of a foreign bill. Suppose, for instance, that there is a bill dishonoured abroad —say, in America—and drawn in dollars, the currency there, the person suing here upon such a bill may recover from the drawer the amount of the re-exchange, that is, the amount in English money represented by the dollars at the time when the bill was due.

Now the re-exchange we have to deal with here is a totally different thing, and, as I have said, has nothing to do with the re-exchange mentioned in the second part of the section. The section itself (going back for a moment to the commencement of it) provides this: "That where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated, shall be as

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Cave, J.

follows." I certainly do not understand that to mean that no damages other than the damages there mentioned shall be recovered. I do not understand it to mean that in no case shall unliquidated damages be recovered on a bill of exchange, but I understand that provision really means this. It is desired occasionally to insert upon the writ a special indorsement in order to enable the plaintiff to recover judgment under Order XIV. If he wishes to do that, then s. 57 provides for the damages which he may indorse, because, undoubtedly, he can only indorse liquidated damages. A debt or liquidated damages may be indorsed, but not unliquidated damages.

Section 57 therefore provides that in the ordinary case of a bill you may treat as liquidated damages, and consequently you may indorse upon the writ, the amount of the bill, interest from a particular time, and the expenses of noting, and, when protest is necessary, the expenses of protest. All these damages may be treated as liquidated damages, and may be indorsed upon the writ. In the case of a bill which has been dishonoured abroad, then, if you wish, in lieu—and the words "in lieu" are correct there—of the above damages you may recover the amount of the re-exchange, that is to say, as I put it just now, in the case of a 1000 dollar bill you may recover in English currency the value of 1000 dollars at the time when the bill became due. That will depend on what the course of exchange may happen to be at that date, and may be a little more or a little less according to the market. Now I am satisfied, as I have said, that the section is meant to provide for the damages which may be treated as being liquidated damages for the purpose of being specially indorsed on the writ, and that it does not intend at all to take away the right which the drawer has to recover from the acceptor any special damages of an unliquidated character which he can prove that he has sustained. Now, the damages which are sought to be proved in this case are damages of that character. They are really unliquidated, for although the statute of the island of Tobago fixes the amount at 10 per cent., yet that is a matter which would have to be proved in an action. The drawer would have to prove that he had sustained the damage in question, and the statute would simply relieve him from proving the actual

amount of damage, and would enable him to claim 10 per cent. irrespective of the actual damage which might be sustained. Now, the damage there arises in this way. A man in Tobago, we will say, wants to buy a bill on London. In order to do so he has to give more than the actual par price in money of the island. It appears the exchange is against Tobago, and so constantly against it, that the legislature has fixed 10 per cent. as being the sum which may be recovered under the circumstances. Now, that as I have said, is unliquidated damages, and to entitle a plaintiff to recover it he must give proof that he has sustained the damage. It is not a matter of course; he must give proof in every case that he has actually sustained the damage. If for any reason whatever an indorser is not compelled to pay that amount to his indorsee, he does not sustain the damage, and not having sustained the damage, he cannot recover it from a prior indorser or from the drawer. Similarly, if the drawer cannot be sued for these damages by his indorsee he cannot recover it from the acceptor; the person who seeks to recover these damages must make out that he has sustained them, that is to say, that he has either actually paid the amount, or at all events is liable to pay it.

Now the greater part of the argument in this case was taken up in fighting the more important matter which I have already disposed of, and some though but small attention was directed to the point whether these damages had actually been sustained or not. I do not know whether the trustee desires to have my attention especially directed to that question: but, as the evidence at present stands, I am not prepared to say that I am satisfied that that liability has been made out. The money has not been paid by the drawer, but he alleges he is liable to pay it. I do not think sufficient attention was paid to that part of the case, and consequently, if the trustee wishes to raise that question, the case must go into the paper again for further evidence to be adduced on the point. If the trustee does not, and he may not, desire to raise that point, then the result will be that the application must be allowed with costs.

Order accordingly.

Solicitors: *Lowless & Co.*; *Druce, Sons, & Attlee.*

H. L. F.

1886
March 2.

JOHNSON, APPELLANT; THE MAYOR, ALDERMEN AND BURGESSES OF CROYDON, RESPONDENTS.

By-law—Unreasonableness—Music in Street, Prohibition of, on Sunday—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 23.

A by-law made by the council of a borough under the 23rd section of the Municipal Corporations Act, 1882, provided that no person not being a member of Her Majesty's Army or Auxiliary Forces, acting under the orders of his commanding officer, should sound or play upon any musical instrument in any of the streets in the borough on Sunday:—

Held, that such by-law was unreasonable and ultra vires, and therefore void.

CASE stated by justices, the facts of which were in substance as follows:—

An information had been laid against the appellant by the respondents, for an offence against a by-law made by the council of the borough of Croydon under the 23rd section of the Municipal Corporations Act, 1882. The by-law provided that "no person not being a member of Her Majesty's Army or Auxiliary Forces, acting under the orders of his commanding officer, shall sound or play upon any musical instrument in any of the streets in the borough on Sunday." It was proved that the appellant did on Sunday, the 3rd of May, 1885, play upon a musical instrument in a street in the borough of Croydon. It was contended, however, for the appellant, that the by-law was invalid as being unreasonable and ultra vires. The magistrates convicted the appellant, and imposed a penalty of ten shillings. The question for the Court was whether the by-law was invalid.

Horne Payne, for the appellant. The by-law is unreasonably wide in its terms. It might have been good if it had prohibited the playing of musical instruments on a Sunday so as to be a nuisance, but it forbids all music whatever. If the council could make such a by-law with regard to Sunday, they could make a similar by-law with regard to a week day. There is nothing in the terms of the 23rd section of the Municipal Corporations Act, 1882, which warrants the making of such a by-law. He cited

Calder and Hebble Navigation Co. v. *Pilling* (1); *Elwood* v. *Bullock* (2); *Everett* v. *Grapes* (3); *Reg.* v. *Powell.* (4)

Cagney, for the respondents. It is not unreasonable to forbid the playing of music in the street on Sunday in a borough. If street music is allowed at all, there is great difficulty in preventing such music as may occasion annoyance or scandal to many of the inhabitants. The magistrates may be trusted not to enforce such a by-law harshly where there is no real annoyance.

HAWKINS, J. I am of opinion that this by-law is bad as being unreasonable, and not warranted by the statute under which it was made; and the conviction must therefore be quashed. It does not seem to me unreasonable to suppose that there might be cases where the inhabitants of a street might desire to have music of a sacred character played on a Sunday, and where such music would not occasion any annoyance. This by-law, however, would include any sort of music played under any circumstances, and however harmless or free from offence such music might be. It appears to me that such a by-law is unreasonable. If the town council desire to have power to put a stop to music of such a character as may be offensive or likely to occasion annoyance to the inhabitants, I think they might probably by means of an amended by-law effect their object, but it is not for us to suggest how such a by-law might be limited so as to be reasonable: all we have to do is to determine whether this by-law is reasonable. The case of *Reg.* v. *Powell* (4) was a very different case from the present. There the by-law imposed a penalty on every person who should sound or play upon any musical instrument in any street or near any house within the borough, after having been required by any householder resident in such street or town or any police constable to desist from making such sounds or noises, either on account of any illness of any inmate of such house, or for any reasonable cause. It appeared that there had been in that case numerous complaints by the inhabitants, and the appellant had been requested by the superintendant of police to desist from playing, but refused to do so. It seems to me that the by-law in

(1) 14 M. & W. 76.
(2) 6 Q. B. 383.
(3) 3 L. T. (N.S.) 669.
(4) 51 L. T. 92.

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that case was a very reasonable by-law. This by-law makes playing a musical instrument an offence, whether it causes a nuisance or annoys anybody or not.

MATHEW, J. I am of the same opinion. It was suggested that the magistrates would have a discretion, and would not enforce such a by-law in cases where there was no annoyance; but, if this by-law were valid, they would have no option and must convict in any case where music was played in the street on a Sunday. This by-law was made under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23, which provides that the council may from time to time make such by-laws as to them seem meet for the good rule and government of the borough, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough. Their power, therefore, to interfere with persons playing on musical instruments in the streets seems to depend on its being shewn that a nuisance is occasioned, but this by-law is not confined to cases where a musical instrument is played so as to be a nuisance.

Conviction quashed.

Solicitors for appellant: *Ranger & Burton.*
Solicitor for respondents: *Dean, for Elborough.*

E. L.

THE QUEEN ON THE PROSECUTION OF HAMMANS *v.* THE JUSTICES OF ANDOVER.

1886
March 20.

Inn—Conviction of Licensed Person for Offence against Licensing Act, 1872—*Record of Conviction on License—Owner of Licensed Premises—Right of Appeal—"Person aggrieved"—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 52, 56; *Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 13.

Where a licensed person is convicted of an offence under the Licensing Acts, 1872–74, and the justices direct the conviction to be recorded on his license, the owner of the licensed premises, who was not and could not have been a party to the proceedings before the justices, is not a "person aggrieved" within s. 52 of the Act of 1872, and has no right of appeal against the order.

CASE stated by the Recorder of Andover, upon appeal against a conviction under the Licensing Acts, 1872–74.

Samuel Garner, the occupier of the Pelican Inn, Andover, was convicted for that he being a licensed person for the sale of intoxicating liquors, did unlawfully permit drunkenness to take place on his premises. He was fined for the offence, and the justices directed, pursuant to the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 13, that the conviction should be recorded on his license.

The appellant, who was not a party to the proceedings before the justices, but who was the owner of the licensed premises, gave notice of appeal to the sessions on the following grounds:—

1. That the conviction was unjust to the owner.

2. That the owner did not know that the licensee had unlawfully used the licensed premises.

3. That the offence of the licensee was a first offence.

4. That the offence was sufficiently punished by the fine then imposed, and that there was no necessity to record the conviction on the license.

At the hearing of the appeal, objection was taken on behalf of the justices to the proceeding on the following grounds:—

1. That the owner not having been a party to the original proceedings had no locus standi before the recorder, and that his remedy, if any, was under s. 56 of the Licensing Act, 1872.

2. That the owner was not an aggrieved person within the meaning of s. 52 of the Licensing Act, 1872, he not being

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immediately affected by the indorsement of the conviction on the license.

3. That the license being the absolute property of the licensee the conviction and indorsement did not entail loss on the owner.

The recorder held that if the owner could prove that he was a person whose pecuniary interest in the licensed premises was immediately affected by the conviction and order, he was an aggrieved person within s. 52 of the Licensing Act, 1872.

Evidence was then given that the value of the licensed premises would be affected if the conviction were recorded on the license, and the recorder allowed the appeal of the owner by ordering the record of the conviction on the license to be struck out. The question for the opinion of the Court was whether the owner was, in the circumstances of the case, a person aggrieved within the meaning of s. 52 of the Licensing Act, 1872?

Addison, Q.C. (*Knowles*, with him), for the justices. The owner of these licensed premises had no right of appeal; he was not and could not have been a party to the proceedings taken before the justices. Those proceedings were taken under 35 & 36 Vict. c. 94, s. 13 (1), and were criminal proceedings against the occu-

(1) 35 & 36 Vict. c. 94, provides, by s. 13, that a licensed person permitting drunkenness on his premises shall be liable to a penalty, and that the conviction shall be recorded on the license of the person convicted unless the justices otherwise direct.

Sect. 31, subs. 2: "When four convictions (whether of the same or of different licensed persons) have within five years been so recorded against premises, those premises shall during one year be disqualified for the purposes of this Act."

Sect. 52: "If any person feels aggrieved by any order or conviction made by a court of summary jurisdiction, the person so aggrieved may appeal therefrom, subject to the conditions and regulations following:—

(1) The appeal shall be made to the next court of quarter sessions . . ."

Sect. 56: "Where any tenant of any licensed premises is convicted of an offence against this Act, and such offence is one the repetition of which may render the premises liable to be disqualified from receiving a license for any period, it shall be the duty of the clerk of the licensing justices to serve, in manner provided by this Act, notice of every such conviction on the owner of the premises.

"Where any order of a court of summary jurisdiction declaring any licensed premises to be disqualified from receiving a license for any period

pier of the licensed premises. Secondly, the owner of licensed premises is not a person aggrieved by an order within 35 & 36 Vict. c. 94. ss. 52 (1). Sect. 56 (1) of that statute gives the owners of licensed premises protection in cases in which a repeated offence may render the licensed premises liable to be disqualified, and that section provides for notices being given to him and for an appeal by him in the cases provided for by that section.

Warry, for the appellant. The owner of these licensed premises is a person aggrieved by the order made by the court of summary jurisdiction. He is therefore within 35 & 36 Vict. c. 94, s. 52 (1), and can appeal to the sessions, for he is a person interested in the licensed premises, and his interest will be affected by repeated convictions recorded upon the license; by s. 31 (1) four convictions recorded within five years disqualify the licensed premises for one year. The position of an owner has been altered by 35 & 36 Vict. c. 94, so that *Reg.* v. *The Justices of Middlesex* (1), which decided that a person aggrieved under 9 Geo. 4, c. 61, s. 27, meant a person immediately aggrieved, does not now apply to an owner of licensed premises whose pecuniary interest will be affected by a conviction recorded on the license. In *Newton* v. *The Justices of the West Riding* (2) it was held that an owner could appeal from a refusal of sessions to grant a license to him in respect of premises of which the license had become forfeited; and in *Garrett* v. *The Justices of Middlesex* (3) it was held that

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has been made, the Court shall cause such order to be served on the owner of such premises, where the owner is not the occupier, with the addition of a statement that the Court will hold a petty sessions at a time and place therein specified, at which the owner may appear and appeal against such order" on certain grounds mentioned in the section.

37 & 38 Vict. c. 49, s. 13, provides that where any licensed person is convicted of any offence against 35 & 36 Vict. c. 94, which by that Act might have been indorsed upon the license, the Court "shall declare, as part of its sentence, whether it will or will not cause the conviction for such offence to be recorded on the license of the offender, and if it decide that such record is to be made the same shall be made accordingly.

"A declaration by the court that a record of an offence is to be made on a license shall be deemed to be part of the conviction or order of the court in reference to such offence, and shall be subject accordingly to the jurisdiction of the court of appeal."

(1) 3 B. & Ad. 938.

(2) 52 L. J. (M.C.) 99.

(3) 12 Q. B. D. 620.

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the mortgagees of licensed premises could appeal against the refusal to grant a license.

[SMITH, J. In those cases the appellants had a right to be parties to the original proceedings at sessions.]

The Licensing Acts of 1872 and 1874 gave the owner a new status. Sect. 56 of the earlier Act shews that it was intended to give him protection in cases of offences committed by a tenant, for the legislature recognised that an owner is interested in the license being kept free from indorsement, and as the register of licenses is produced at licensing sessions a conviction recorded on the license materially diminishes the value of the licensed premises. *Wooler* v. *Knott* (1) shews that a conviction recorded on a license would be a breach of a covenant not to suffer anything to be done which may affect the license.

MATHEW, J. I am of opinion that the order of the sessions must be quashed. The appeal of the owner of the public-house to the sessions was in fact an appeal ad misericordiam, on the ground that the order made by the justices upon the conviction was over severe as regarded him, and that he could question a conviction which affected him, inasmuch as he was a person aggrieved within the meaning of 35 & 36 Vict. c. 94, s. 52. That section enables a person who feels "aggrieved by any order or conviction made by a court of summary jurisdiction" to appeal from it, subject to the conditions specified in that section. It is, I think, conceded that the owner of the public-house could not appeal against the conviction itself; but it is argued that, as the justices directed that the conviction should be recorded on the license held by the tenant, there was an order which affected the owner, so that he became a person aggrieved by an order within the meaning of the section referred to. I am, however, of opinion that s. 52 applies to a person directly aggrieved by the order, and that a person who, like this owner, feels himself to be indirectly aggrieved by the order cannot appeal against it. Any other interpretation would lead to most preposterous consequences, for then not only might the owner, but a mortgagee, or a creditor of the tenant, or a creditor of the owner, might each

(1) 1 Ex. D. 265.

feel himself aggrieved, and claim to appeal against the order, so that there would be scarcely any limit to the appeals which might be brought. Reference has been made to s. 31 of the same Act, which provides that when four convictions "have within five years been recorded against premises, those premises shall for one year be disqualified for the purposes" of the Licensing Act, 1872, and it has been argued that in consequence of these provisions repeated convictions recorded against the tenant of a licensed house will affect the licensed premises themselves, and therefore that in the case of a conviction so recorded the owner of the licensed premises is threatened with injury to his property, that he is aggrieved by a conviction recorded on the license, and that he has consequently a right to appeal. This argument is answered by s. 56 of the same Act, which gives protection to the owners of licensed premises in cases of offences committed by their tenants, when the offence is one the repetition of which may render the premises liable to be disqualified from receiving a license. The section provides that notice of every such conviction must be served upon the owner of the premises, that an order declaring any licensed premises to be disqualified from receiving a license must also be served on him, and that a court is to be held at which the owner can take the opinion of the justices as to the propriety of the disqualifying order. Sect. 56, however, limits the right of the owner strictly to the grounds mentioned in that section; but, as I have said, the provisions of the section appear to me to meet completely the suggested grievance.

I do not refer to the cases which have been cited, for they all appear to me to be remote from the point which is before us for decision.

A. L. SMITH, J. The question before us is, what is the true interpretation of 35 & 36 Vict. c. 94, s. 52. The facts may be shortly stated. An occupier of licensed premises has been convicted before justices who imposed a fine, and directed the conviction to be recorded on his license. It is not suggested that the conviction was wrong; but the owner of the licensed premises appealed to the sessions on the ground that the direction that the conviction should be recorded on the license was unjust to

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him. What has that to do with the offence? He further says that he did not know that the licensee had committed an illegal act. What has that to do with the offence? He then urged that the offence was a first offence, and that the conviction ought not to be recorded on the license. The owner, to support his right to appeal, urged that he had a pecuniary interest in these licensed premises, that that pecuniary interest may be affected by repeated convictions recorded on the license, and that he is, therefore, a person aggrieved within s. 52 of the Licensing Act, 1872.

I am of opinion that the internal arrangement of that section shews that he is not a person aggrieved within the meaning of the section, for I think that it applies to the parties originally before the justices, and that by a person aggrieved is meant primâ facie the person against whom the proceedings were originally instituted. It seems to me that subs. 2 of s. 52, which provides for "notice to the other party," and subs. 4, which provides for the case of the appellant being in custody, support this view, and shew that the person aggrieved is primâ facie the person against whom an order has been made, while the whole section seems to point to the prosecutor and the defendant as the persons contemplated by it and not to such a person as the owner of licensed premises, who is in no sense a party to the original proceedings before the justices.

It has been argued on behalf of the owner that the position of an owner of licensed premises is very different now from what it was before the Act of 1872 (35 & 36 Vict. c. 94) was passed, inasmuch as four convictions recorded on a license may affect the premises and cause them to be disqualified for the purposes of the Act. The legislature has, however, anticipated this argument, for it has given by s. 56 protection to the owner, and has required that certain notices shall be served on him which will enable him to take steps to prevent the premises from becoming disqualified if he can satisfy the provisions of that section.

With regard to the cases cited, I do not think they apply to this case. The case of *Newton* v. *The Justices of the West Riding* (1) only decided that as in certain cases a license may be transferred

(1) 52 L. J. (M.C.) 99.

to the owner of the premises, and as the owner is in such cases a party to the original proceedings he may therefore be a party aggrieved by an order made in those proceedings. Such an owner, therefore, has in such a case a right of appeal, for, as was there held, certain provisions of the Licensing Act, 1828 (9 Geo. 4, c. 61), are incorporated with the Licensing Act, 1874 (37 & 38 Vict. c. 49). In the case of *Garrett* v. *The Justices of Middlesex* (1) the tenant really wished to defeat the right of the mortgagees, who had also been appointed by power of attorney to act for the tenant in respect of licensing matters, so that the mortgagees were persons who had a right to have the license renewed, and it was therefore held that they were persons aggrieved within the meaning of 9 Geo. 4, c. 61, s. 27.

The case now before us is quite distinct from those cases, because the owner of these premises never had any locus standi at all in the original proceedings, and it appears to me that a person to be a person aggrieved within s. 52 of this Act must be a person who has a locus standi in the proceedings when they are first taken before the justices. The judgment of the recorder cannot be confirmed, and his order must be quashed.

Order of sessions quashed.

Solicitors for the Justices: *Peacock & Goddard, for Longman, Andover.*

Solicitors for appellant: *Stocken & Jupp, for Godwin, Winchester.*

(1) 12 Q. B. D. 620.

R. B. R.

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March 20.

WILLIAMS, Appellant *v.* WALLASEY LOCAL BOARD, Respondents.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 156—"*Bringing forward*" *a House—Application of Section to new Buildings on Land never before built upon.*

In the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 156,—which enacts that it shall not be lawful in any urban district without the written consent of the urban authority to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof—the expression "house or building" does not include new buildings in course of erection upon land never before built upon.

Case stated under 20 & 21 Vict. c. 43.

The appellant was convicted upon an information preferred by the respondents, the Wallasey Local Board (the urban authority for the parish and district of Wallasey), under 38 & 39 Vict. c. 55, s. 156, charging that he did within six calendar months previously unlawfully and without the consent in writing of the respondents bring forward a house forming part of a street called Hatherley Street, within the district of the respondents, and had continued to do so after he had received written notice from them to remove the building.

It appeared that in 1877, Evans, the owner of a field in the parish of Wallasey, submitted to the respondents a plan for laying out the same in streets, in which houses were to be built, and the plan was approved by them. These streets were designed to run parallel to each other, and all opened at the north end into a road called Victoria Road. The width of each of these streets as marked on the plan was thirty feet.

Evans was entitled, in accordance with the plan, to erect buildings on the land with their front walls set forward to the lines of the street as shewn on the plan; but he erected certain houses in one of these streets, called Hatherley Street, with open areas inclosed by railings in front, so that the front walls of the houses were set back a few feet from the line of the street as marked on the plan.

The appellant began to build six shops at the north end of

Hatherley Street, where it joins Victoria Road. These shops fronted Victoria Road, but the side wall of the corner shop which abutted on Hatherley Street was carried forward to the line of Hatherley Street as marked on the plan, so that it came further forward than the fronts of the houses already built by Evans in that street. The land upon which the appellant began to build these shops had never before been built upon.

The respondents required the appellant to set back the side wall of the corner shop so that it should be in a line with the fronts of Evans' houses in Hatherley Street, and as he refused to do so the information was preferred. It was contended on behalf of the appellant that s. 156 of the Public Health Act, 1875, applies only to houses or buildings forming part of any street, that is to say, to houses already built and actually existing, and that the section does not apply to an intended house or building to be erected upon land never before built upon. The justices were of opinion that the section applies to houses and buildings in course of erection, and convicted the appellant.

The question for the opinion of the Court was whether s. 156 of the Public Health Act, 1875, applies to new houses or buildings to be built or in course of erection upon land never previously built upon.

R. S. Wright, for the appellant. Sect. 156 of the Public Health Act, 1875 (1), only applies to the cases of an old house being pulled down and a new house or building being erected on the same site. This section is connected with and subordinate to s. 155, which deals with buildings already existing, while s. 157 applies to new buildings, and contains provisions relating to matters not included in ss. 155 and 156. It is true that in

(1) 38 & 39 Vict. c. 55, s. 156: "It shall not be lawful in any urban district, without the written consent of the urban authority, to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto beyond the front of the house or building on either side of the same. Any person offending against this enactment shall be liable to a penalty not exceeding forty shillings for every day during which the offence is continued, after written notice in this behalf from the urban authority."

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Robinson v. *Local Board for Barton-Eccles* (1), Fry, J., said that in opinion s. 156 of this Act might apply to a new building; but the question was not argued before him, and when that case was under appeal in the House of Lords (2) Lord Selborne and Lord Blackburn expressed a different opinion. (3)

The wording of the section itself points to this conclusion, for the words "bring forward" and "forming part of any street" are not applicable to new buildings. Provisions of a similar nature are found in the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102, s. 75), but the enactment there is that no building shall be "erected" beyond a certain line, and that the board shall have power to order the demolition of a building in case it be "begun to be erected" beyond such line.

The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 211, provides for an appeal against an order of a local board in relation to the level of a building, and provides for compensation. The Local Government Amendment Act, 1861 (24 & 25 Vict. c. 61), in which a section similar to the one now under discussion is found, did not contain any such provision as to new buildings, and that Act was repealed by the Public Health Act, 1875, which was substituted for it. There is no provision for compensation in respect of such a case as this, so that it is not to be presumed that the section was intended to apply to new buildings, since s. 155, which applies to alterations of old buildings, contains an express provision for compensation in cases in which the owners of old houses suffer damage in consequence of an alteration in the line of frontage.

Crump, Q.C. (*Synnott* with him), for the respondents. Sect. 149 of the Public Health Act, 1875, shews that the object of the Act is different from that of other Acts to which reference has been made. This Act gives the local authority full power to deal with streets which are vested in them. They have power by s. 154 to purchase any premises, by s. 155 to prescribe a new line of frontage in the case of old buildings being rebuilt, while s. 156 empowers them to prescribe a line of frontage in case of the

(1) 21 Ch. D. 621, at p. 629. (2) 8 App. Cas. 798.
(3) 8 App. Cas. 798, at pp. 808, 810.

erection of new buildings or of additions to old buildings. There is no reason why the words "bring forward" should not apply to a new building, as Fry, J., held that they might in *Robinson* v. *Local Board for Barton* (1), and that part of his judgment was not overruled in the House of Lords. The statute, therefore, gives the local authority power to prescribe a line of frontage, and in this case such a line has been in fact prescribed by the person who has already built houses in the street, so that the appellant has disregarded the provisions of s. 156, because he has without the consent of the urban authority brought forward a building forming part of a street beyond the front wall of the building on one side of it.

[MATHEW, J. Is that not to say that in fact builders of other houses may prescribe the line of frontage?]

It may be that the urban authority can choose to adopt the line of frontage selected by the person who first erects a building in a new street.

MATHEW, J. I am of opinion that this appeal must succeed, and that this conviction cannot be sustained. The question is, whether 38 & 39 Vict. c. 55, s. 156, applies to new buildings erected on ground not before built upon. It is conceded that the first person who erects buildings in such a place as that described in this special case is not bound to build right up to the frontage line of the street, for he may set his buildings back from that line, as Evans has done in this case. The wall to which objection has been taken by the local board for this district is within the frontage line of the street, although it extends farther forward than the front walls of those houses which Evans had previously erected in this new street. It is argued that as this is the case the appellant is liable to a penalty for every day during which the wall is allowed to stand, as it is said that what the appellant has done is in contravention of s. 156 of the Public Health Act, 1875. But that argument really comes to this, that the owner or builder of houses already erected in such a street as this, or the person who first erects buildings in such a place as this, can in fact prescribe the line of frontage to be followed by

(1) 21 Ch. D. 621, at p. 629.

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other persons who may begin to build at a subsequent time. I do not think that s. 156 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), does enact this. That section does not, as it seems to me, apply to new buildings which are being erected in such a place as that described in the special case.

It applies, I think, only to structures already erected, for it says that it shall not be lawful "to bring forward any house or building forming part of any street," that is, I think, of any existing street, and the words "bring forward" point, as has been said in argument, to buildings already existing, for those words point to an alteration of an existing building. This being so, the local authority had no power to convict the appellant, and this appeal must be allowed.

A. L. SMITH, J. I am of the same opinion. It is stated that Fry, J., expressed an opinion in *Robinson* v. *Local Board of Barton* (1) that this section applies to new buildings, but the point was not argued before him, and there is the weighty authority of Lord Selborne and Lord Blackburn in the same case when on appeal to the contrary effect. Lord Blackburn said (2): "The sections which have been referred to shew that when dealing with old buildings, buildings that already exist but which are about to be pulled down in order to be rebuilt, or altered, or advanced, the legislature have provided for a building line, which is the line of the existing buildings on that side of the street. That renders it very likely indeed, that the legislature would, if they had thought of it, have passed a provision giving power to do something in a new street where there were no buildings, and that would not have been unreasonable. But the legislature have not themselves done so. . . ." I only desire to add that s. 75 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), which deals with a similar matter, expressly enacts that "no building, structure or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street," and further enacts that in case any building "be erected" or "be begun to be erected" without such consent an order may be obtained for its demolition.

(1) 21 Ch. D. 621. (2) 8 App. Cas. 798, at p. 810.

The Public Health Act, 1875, does not contain any such provision, so that I am of opinion that the local authority had not the power which they claimed to have, and therefore that this appeal must be allowed.

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Judgment for the appellant.

Solicitors for appellant: *Chester & Co.*

Solicitors for respondent: *Jaques, Layton, & Jaques, for Layton & Steele, Liverpool.*

R. B. R.

THE OVERSEERS AND GUARDIANS OF MANCHESTER, APPELLANTS; THE GUARDIANS OF ORMSKIRK, RESPONDENTS.

March 26.

Poor Law—Settlement by Residence—Break of Residence—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), s. 34.

The pauper was employed from November, 1873, to July, 1878, as an indoor resident nurse at an infirmary in M. She was under the authority of the lady superintendent of nurses in the infirmary, and was bound by the terms of her agreement to undertake any duties that might be assigned to her either as a hospital or a private nurse. For five months in 1876, and for three months in 1877, she acted, under the orders of the lady superintendent, as a nurse at a branch establishment out of M., returning to the infirmary as soon as her duties ceased at the branch establishment. During this absence her wages were paid from the head institution at M., and the greater part of her effects during the first period of absence was left behind her in her box in the dormitory at the infirmary, to which place she went from time to time for change of clothing as required :—

Held, that the absence of the pauper for the two periods did not amount to a break of residence, and that she had gained a settlement in M. by three years' residence within the meaning of 39 & 40 Vict. c. 61, s. 34.

CASE stated under 12 & 13 Vict. c. 45, s. 11, upon appeal against an order of justices of the 7th of August, 1885, adjudicating the settlement of Louisa Elizabeth Eastwood, a pauper lunatic, to be within the appellant township.

The pauper, a single woman, was employed by the trustees of the Manchester Royal Infirmary as an indoor resident nurse from the 3rd of November, 1873, to the 20th of July, 1878, when she was discharged. By the terms of her engagement she was under the authority of the lady superintendent of nurses of the infirmary,

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and was required to undertake whatever duties she might be ordered, whether as a hospital or private nurse. Save as found in the case, the pauper during her term of employment by the trustees, served them and lived at the Manchester Royal Infirmary in the appellant township.

From some time in the month of January until some time in the month of June, 1876, and again from the 29th of September to the 25th of December, 1877, the pauper was sent, by direction of the lady superintendent, from the Manchester Royal Infirmary to, and she served the trustees and resided at, a branch establishment of the Manchester Royal Infirmary, known as the Monsall Fever Hospital, in the township of Newton, in the Prestwich union, in consequence of an influx of infectious cases at the Fever Hospital; but on each occasion when the pressure of work at the Monsall Fever Hospital had ceased she returned, by direction of the lady superintendent, to the Manchester Royal Infirmary.

The Monsall Fever Hospital, in the years 1876 and 1877, although a separate building, was entirely under the management of the board of management of the Manchester Royal Infirmary. It had no qualified resident medical officer, but simply a matron, and all wages were paid from the Royal Infirmary at the Monsall Hospital. If it was necessary that a nurse should be dismissed during the quarter from the Monsall Fever Hospital, it could only be done by the lady superintendent of nurses at the Royal Infirmary, and the nurse so dismissed must have gone to the Royal Infirmary for her wages.

On the first occasion of the absence of the pauper from the appellant township she left behind her at the Manchester Royal Infirmary the greater part of her property and effects in her box in the dormitory used by her at the Royal Infirmary. It was the practice of the lady superintendent to tell nurses when sent to the Monsall Hospital to take as little of their clothing as possible with them to the said hospital; and it was a fact that the pauper, on the first occasion of absence at the Monsall Hospital, from time to time went to the Royal Infirmary for change of clothing as she required it, and it was the practice of nurses to do so.

The appellants asserted, and the respondents denied that the

absence of the pauper from the Manchester Royal Infirmary constituted a break of residence.

The question for the Court was whether or no, upon the facts set out, the pauper acquired a legal settlement in the township of Manchester under the provisions of s. 34 of 39 & 40 Vict. c. 61, by reason of a three years' continuous residence therein.

Addison, Q.C., for the appellants. The two physical breaks of residence by the pauper were such as to prevent her acquiring a settlement in Manchester under 39 & 40 Vict. c. 61, s. 34. She was compelled to live elsewhere than at Manchester by the terms of her contract; no animus revertendi on her part was shewn, and she had no power of returning when she pleased and no home to return to. She lived in Monsall and received her wages there; she had no duties to perform in Manchester while resident at Monsall. She contracted to serve outside Manchester, and absence under a contract of service without the power of returning constitutes a break of residence: *Reg.* v. *Stapleton* (1); *Merthyr Tydvil* v. *Stepney* (2); *Reg.* v. *Glossop* (3); *Reg.* v. *Worcester* (4); *Reg.* v. *Stourbridge.* (5)

Smyly, for the respondents, was not called upon.

MATHEW, J. Upon the findings of fact in the case stated by the parties I am of opinion that there was no break of residence by the pauper. It is to be taken as a fact that, except as found in the case, she was actually residing in Manchester. Did her absence for the two periods in 1876 and 1877 amount to a break of such residence? Let us see what her alternative residence is supposed to have been. It is argued that she resided, under her engagement, at Monsall Fever Hospital, and thereby gave up her residence in Manchester. But is this so? It is true that under the terms of her contract she might have to undertake whatever duties she was ordered, and that the authorities had a right, which they exercised, to require her to leave the hospital and to go to another establishment or to a private house. But her contract was not one which must necessarily be performed outside Manchester; on the contrary, it was quite possible that

(1) 1 E. & B. 766.
(2) 53 L. J. (M.C.) 183.
(3) Law Rep. 1 Q. B. 227.
(4) Law Rep. 9 Q. B. 340.
(5) 34 L. J. (M.C.) 179.

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during the three years she might not have been required to leave Manchester at all. Then her wages, though actually received by her at Monsall, were paid from the institution in Manchester, and her clothes remained there while she was away at the fever hospital. What, then, was the character of her residence at Monsall? I am clearly of opinion that it was merely a temporary residence, and that she came there not for the purpose of effecting a change of residence, but because she happened to be sent there under her contract of service. The appeal must be dismissed.

A. L. SMITH, J. I have no doubt upon the facts found in the case that the pauper acquired a settlement in Manchester under s. 34 of the Divided Parishes Act, 1876, and that she resided there for the qualifying period of three years, in such manner and under such circumstances in each of such years as would have rendered her irremovable. But it is argued that she entered into a contract to serve outside Manchester, and that the two periods of her absence under her contract were breaks of her residence in Manchester within the principle laid down by Lord Campbell in *Reg.* v. *Stapleton.* (1) But Lord Campbell's judgment by no means goes the length contended for; it only says that where a man voluntarily contracts to go outside parish A. into parish B., and to work and live in the latter parish, he gives up his first residence. In *Reg.* v. *Worcester* (2) Blackburn, J., says: "It is not the case of the pauper being hired out by the master of the workhouse, but his leaving the workhouse voluntarily to go to work," and it is clear that in the opinion of that learned judge there would have been no break of the pauper's residence in Birmingham if he had been sent out to Smethwick by the master of the workhouse. Those words clearly shew the distinction between that case and the present, and the decision of the justices must be affirmed.

Appeal dismissed.

Solicitors for appellants: *Johnson, Weatherall & Johnson, for Lings, Manchester.*

Solicitors for respondents: *Gregory, Rowcliffes & Co., for Parr, Sadler & Dickinson, Ormskirk.*

(1) 1 E. & B. 766. (2) Law Rep. 9 Q. B. 340.

W. J. B.

[IN THE COURT OF APPEAL.]

1886
March 6.

CANNING *v.* FARQUHAR.

Insurance, Life—Agreement for Insurance—Conclusion of Contract—Proposal and Acceptance—Material Alteration of Risk before Tender of Premium.

A proposal was made to an insurance company for an insurance on the life of the proposer, who made, on a form issued by the company, statements as to his state of health and other matters, and a declaration that the statements were true and were to be taken as the basis of the contract. The proposal was accepted at a specified premium, but upon the terms, that no insurance should take effect till the premium was paid. Before tender of the premium, there was a material alteration in the state of the health of the proposer, and the company refused to accept the premium or to issue a policy:—

Held, that the nature of the risk having been altered at the time of the tender of the premium there was no contract binding the company to issue a policy.

Quære, whether if there had been no alteration in the risk, the company would have been legally entitled to refuse to accept the premium and to issue a policy.

APPEAL from the judgment of Pollock, B., for the defendant on further consideration.

The plaintiff was the administrator of A. S. Canning, deceased, and the action was brought against the defendant as representing the Sun Life Assurance Society. The cause of action alleged was that the society agreed with A. S. Canning in his lifetime to insure his life for one year on payment by or on his behalf of the premium of 47*l.* 18*s.* 4*d.*, but although the premium was tendered within one month of the acceptance by the society, the time allowed for payment thereof, yet the society refused to receive it, and repudiated the agreement, and refused to issue a policy or to pay on the death of A. S. Canning the sum insured, or any of it.

The facts were as follows: On the 8th of December, 1883, a proposal form was forwarded by one Walters to the society. The form contained the usual questions that are put to proposing insurers duly answered by A. S. Canning, and a certificate signed by him that all the statements were true, that he was then in good health, and as to certain other matters, and a declaration as follows: "I, Alfred Samuel Canning, described in the fore-

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going proposal, being desirous of assuring with the Sun Life Assurance Society, the sum of 2000*l.* with profits on my own life, do hereby declare that the whole of the statements made by me in the said proposal are true; and this declaration, together with the certificate signed by me in the presence of the medical examiner, is to be the basis of the contract between me and the said society: and if any untrue averment is contained in this declaration, in the statements made by me in the said proposal, or in the said certificate, then this contract shall be void and all moneys which shall have been paid to the said society upon account of the insurance made in consequence thereof shall be forfeited." On the 14th of December the actuary wrote to Walters: "The proposal to insure 2000*l.* with profits on the life of Mr. Alfred Samuel Canning has been accepted at the annual premium of 47*l.* 18*s.* 4*d.*" There was a note to the letter, "No assurance can take place until the first premium is paid." On the 7th of January, 1884, a letter was written on behalf of the society to Walters, reminding him that, "unless the first premium is paid by the 14th inst., Mr. Canning will have to sign a certificate of health," and adding, "on receipt of the premium the policy will be prepared." In the meanwhile, on the 5th of January, Canning had fallen over a cliff, and seriously injured himself. On the 9th of January Walters went to the office of the society, and tendered the premium, but at the same time he informed them of the accident to Canning, and the premium was refused. Canning died shortly after. The action was tried before Pollock, B., without a jury, and after hearing arguments, on further consideration, judgment was given for the defendant with costs. The plaintiff appealed.

A. Charles, Q.C., and *R. M. Bray*, for the plaintiff. On the acceptance of the proposal there was a contract binding the society to issue a policy on payment of the premium. The deceased did not warrant anything but the truth of his statements at the time they were made, and the acceptance was on that footing. Anything that happened after the acceptance was immaterial to the contract so entered into. It was suggested that this would create a liability for a longer period than twelve months, namely, the time from between the acceptance and the payment

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of the premium and twelve months after that; this is a misconception, for had the proposer died before tendering the premium the risk would not have attached, as a policy would commence to run from the time of acceptance or tender of the premium.

E. Clarke, *Q.C.*, and *Jeune*, for the defendant. There was only to be one contract, and that one was for insurance for a year from the time of payment of the premium. Till that event there was no intention on either side that there should be any binding contract. The deceased was not bound to pay the premium nor the society to accept it. The contract of insurance was intended, if made, to be on the basis of the declaration and certificate, and in such case the statements in these documents must be true when the contract is made, otherwise the intention cannot be carried out. The representations are continuing, and if not true when the contract is made the basis of the contract is gone. The course of the negotiation was this, first a proposal on which there is no mention of an essential term, namely, the amount of premium. Then the society, having satisfied themselves by the report of their medical officer, and otherwise, accept the proposal and name the amount of the premium; when the proposer shews that he agrees to this new term by paying the amount mentioned, then, and not till then, is the contract complete. The acceptance by the society is in fact an acceptance of the terms of the proposal as the basis of a contract between themselves and the proposer, and does not constitute the two documents a contract.

[They cited *Edwards* v. *Footner* (1), *Traill* v. *Baring* (2), and *Davies* v. *London and Provincial Marine Insurance Co.* (3)]

R. M. Bray, in reply. It cannot have been intended that all the statements in the declaration should be continuing representations, otherwise what is the use of giving a month for payment of the premium, and what is the meaning of the necessity for a fresh declaration of health after a month. The statements themselves bear this out, for what difference could it make in the risk if both parents were alive when the proposal is made, but one dies before payment of the premium. What was intended was, that for a month the offer was open on the footing of

(1) 1 Camp. 530.

(2) 4 De G. J. & S. 318.

(3) 8 Ch. D. 469.

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truth of the statements when made, and if so the society were bound to issue a policy on tender of the premium within the month. The acceptance cannot be treated as a counter offer or as adding a new term, for the proposal was based on the tables of the society, which shew the amount of premium payable in such a case. The case is like that of a tender which is accepted and is binding on the person who tenders: *Great Northern Ry. Co.* v. *Witham* (1); or a contract to carry a passenger arising from the publication of time tables: *Denton* v. *Great Northern Ry. Co.* (2) Even if the proposal and acceptance did not in themselves make a contract there was one directly the premium was tendered, for by the tender the proposer signified his final acceptance of the terms, and the society were bound to accept the premium.

LORD ESHER, M.R. This seems to me to be a very important case in insurance law, and at the beginning of it I was much taken with the ordinary proposition that a proposal and an acceptance of that proposal make a contract. Whether that is so or not depends on whether the one was meant to be a proposal, and the other an acceptance by way of contract, and we are bound to look further and see what was the subject-matter. What is the contract of life assurance? It is this, "Taking the life to be good at the commencement of the risk I insure that life for a year at a certain premium." From this it is apparent that the material moment for the agreement as to the state of health is when the risk commences, that is, at the beginning of the year, for it is not denied that the agreement is only for a year. Now it is said that before that year commenced there was a binding agreement to insure. But is it possible to say that when parties are discussing beforehand the conditions of the risk they mean to treat what they then say are the existing facts as binding them when the moment to make the contract arrives? No one can bind himself as to the state of his health a short time hence, and a man who makes a statement as to his state of health cannot mean to be bound as to what it will be a month hence, neither can the person to whom the statement is made be taken to rely on it further than as it may guide him in accepting the insurance or

(1) Law Rep. 9 C. P. 16. (2) 25 L. J. (Q.B.) 129.

not. These considerations shew that all these statements which are made preliminary to the moment of insurance are not considered by either party as contractual statements, but as expressions of intention on the one side to insure, on the other to accept the risk. That seems to me to be the view at which we must arrive looking at this as a business transaction. Now there is no case that supports affirmatively this view, but it is supported negatively by the fact that during all the years that life insurance has been known and practised, there is no case in the books or known to any one in which an action such as this has been maintained. These considerations are conclusive to my mind that what was said was preliminary to the contract of insurance, and was never intended by either party to be a contract in itself.

From this it follows that after the insurance company have said that they accept the proposal, and that if the premium is paid they will issue a policy, although there is no change in the circumstances, and all that has happened is that they alter their mind, yet they are not bound to accept the premium. I do not shrink from saying that in my view of insurance law there is no contract in such a case binding them to accept the premium. If so this action fails, because tender is only equivalent to payment if the person to whom the money is offered is bound to accept it. If the premium is offered and accepted there is at once an insurance, and the year for which the insurance runs commences then, and if the policy is drawn up properly that will appear in it.

But then there is another view short of that. Supposing it to be true that after all the terms are agreed on, and the premium is offered, the company are bound to accept it, when does the contract of insurance commence? It commences at the time when the premium is offered, because in this case tender would be as good as payment. There is no insurance before that, but only a contract to the effect, "If you will offer the premium we will insure." The only consideration any one can suggest for this contract is the trouble the man takes to bring his money. What then happens with regard to any previous examination or declaration of health, neither of which is material unless the company insist upon it. This is material, that the person to be

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insured should not conceal any material fact, and that his statements, if he makes any, should be correct. In this case the declaration was a representation which was true at the time it was made. In insurance law that is not the material time, but the material time is the moment when the insurance is made, and the representations ought to be true then. If there has been a material change there ought to be an alteration of the representation, and the ground for entering into the contract is altered. In this case the ground of the contract to give an insurance being changed, it was not binding on the society at the time of the tender of the premium, and they had a right to say "the circumstances are altered, therefore we will not insure," even though, if the circumstances had not been altered, they would have been bound by their contract. It seems to me, therefore, that the appeal fails. In my opinion, however, the real ground for our decision is that the negotiations before the time when the policy is effected are mere statements of intention, and that till the insurance company accept the premium they have a right to decline to accept the risk.

LINDLEY, L.J. This action is for damages for breach of a contract to grant a policy on the life of Canning, and the question is whether the Sun Office was bound to issue a policy. This turns, it appears to me, on the question whether the office was bound to accept the premium which was tendered during the lifetime of Canning. It is said the office was so bound by contract, and we have to investigate this and see how it is made out. On the 8th of December Canning sent a proposal to the office. In that there was nothing about the premium that would be payable; with that document was a declaration of the truth of certain statements made by Canning, which was to be the basis of the contract. That was followed by the usual reference to friends, and an examination by the medical officer of the office. On the 14th of December the office made a communication to Canning, through Walters, that his proposal had been accepted subject to payment of a certain premium. I pause here for a moment to consider the effect of these negotiations. It was urged on the part of the plaintiff that there was then a complete contract

binding the office on payment or tender of the premium to issue a policy of insurance. It is true that there had been an acceptance of Canning's offer, but he had not at this time assented to the company's terms; and until he assented to them there was no contract binding the company. The company's acceptance of Canning's offer was not a contract but a counter offer. Subsequently the premium was tendered, and I think there would be considerable difficulty, if there had been no change in the risk, in saying that the company, under such circumstances, might decline to accept the premium and issue the policy. In the case supposed the counter offer would be a continuing offer; the tender would be an acceptance of it, and the company would be bound to issue the policy. But the case supposed is not the case we have to deal with here, because another element is introduced by reason of the material change in the risk in the interval between what I have called the counter offer and the tender of the premium. If Canning had tendered the money and had not informed the office of the alteration in the character of the risk, he would have been attempting to take advantage of an offer intended to cover one risk in order to make it cover another risk not known to the office. In other words, if he had paid the money without disclosing to the office the fact that his statements, which were true when he made them, were so no longer, he would have done that which would have been plainly dishonest. But that was not done—the alteration was disclosed, and the company refused to take the risk. I think they were perfectly justified in so refusing. It comes to this: there was no contract before the tender; and the risk being changed the company's offer could not fairly be regarded as a continuing offer which Canning was entitled to accept. His tender was in truth a new offer for a new risk which the company were at liberty to decline. It appears to me, therefore, that this action fails, and the appeal ought to be dismissed.

LOPES, L.J. This is an action brought by the plaintiff, as the legal representative of a deceased person who endeavoured to effect an insurance with the Sun Office, to recover compensation because they had not, in accordance with an agreement they

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made, issued a life policy. The plaintiff relies upon the proposal made by the deceased, and the acceptance by the office. I think, however, that these amounted only to negotiations. All that was done was preliminary and with a view to an insurance to be thereafter made, and no final contract between the parties was intended until the premium should be paid. I am fortified in this view by finding that in the acceptance itself is the declaration that there is to be no insurance till the first premium is paid. It appears to me that the true meaning of this is that until the premium is paid no liability at all is to attach to the office. That being so, when the premium was tendered the office were justified in refusing to accept it on the ground that no binding contract existed which compelled them to do so. They were entitled to say that what had taken place between the parties amounted to a negotiation only, and that as there had been a change in matters materially affecting the risk they had a right to withdraw their acceptance of the plaintiff's offer. If there had been no change of circumstances, and the premium had been duly tendered, I might have a difficulty in saying that the office could have refused to issue a policy, but that question does not arise, and I do not wish to express any opinion about it.

Appeal dismissed.

Solicitors for plaintiff: *Crowdy, Son, & Tarry.*
Solicitors for defendant: *Ford, Ranken Ford, & Ford.*

A. M.

[IN THE COURT OF APPEAL.]

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Feb. 3.

HUTH & CO. *v.* LAMPORT AND ANOTHER.
GIBBS & SON *v.* LAMPORT AND ANOTHER.

Ship—General Average—Security for Payment—Unreasonable Terms—Liverpool Bond.

Where a shipowner in the exercise of his lien for general average requires security from the owner of the cargo liable to contribution without insisting upon immediate payment of the amount due, the security so required must be reasonable.

The defendants, who had a lien upon goods on board their ship for general average, did not demand payment of the amount due, but required as security that the consignees should make a deposit of 10 per cent. on the estimated value of the goods in the joint names of the defendants and their average adjuster, or in the names of the defendants, or in the name of the average adjuster, or should execute a bond providing that the deposit should be held as a security for the general average and particular charges, and that the parties in whose name it stood might pay thereout such sums as they should from time to time consider ought to be paid to the owners or master on account of money actually disbursed by them or him, or to enable them or him to pay off and discharge claims which formed part of the general average and other expenses. It also provided that all questions of general average should be referred to the average adjuster of the shipowner, subject to an appeal from the adjustment to arbitrators, whose decision should be final:—

Held, by the Court of Appeal, affirming the judgment of the Queen's Bench Division, that the conditions of the deposit and the form of the bond were both unreasonable, and could not in the circumstances be imposed upon the consignees.

APPEAL from the judgment of the Queen's Bench Division, reported ante, p. 442, where the facts are fully stated.

Finlay, Q.C., and *W. R. Kennedy, Q.C.* (*Box*, with them), for the defendants. The judgment of the Court below—holding that the security for general average on the terms required by the defendants was unreasonable—cannot be supported. The defendants had a lien for general average. Such a lien is upon the same footing as other liens, and the shipowner before parting with the goods was not bound to accept security, but could insist upon payment of the amount of average contribution. If he takes security it must be such security as he thinks reasonable. The security which the defendants required was in accordance with

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the practice at Liverpool for the past fifteen years, and it must be presumed that it was in fact reasonable. The plaintiffs never tendered the amount of average, for the fact that it had not been ascertained made a tender impossible.

[They cited *Simonds* v. *White* (1); *Crooks* v. *Allan* (2); *The Norway*. (3)]

Cohen, Q.C. (*Barnes*, and *Warr*, with him), for the plaintiffs, was stopped.

LORD ESHER, M.R. The order of the Queen's Bench Division must be affirmed, though I do not think that the grounds of our decision will be satisfactory to either of the parties. The defendants' ship arrived at the port of destination, after a voyage in which a general average loss had occurred. The plaintiffs as owners of goods on board the ship were liable to contribute to this general average loss. The defendants as shipowners had a lien on all the goods on board to secure payment by each owner of his proportion of this general average, and were entitled to refuse to deliver goods to any consignee of the cargo until they were paid the amount of the general average to which he was liable, and they were not bound to accept security for the amount due in lieu of immediate payment. The result is that each consignee must pay the amount which is demanded by the shipowner for general average, or must at his own risk tender what he thinks is his proper proportion. Of course the master would have no right to insist upon payment of an arbitrary sum without furnishing the necessary account or particulars, to enable the owner to ascertain how this amount became due. If the master refused to furnish such particulars the case would come under the rule laid down by Dr. Lushington in *The Norway* (4), and the consignee would not be prejudiced by not having made a sufficient tender. But if after giving all proper information the master were to say, "you must either pay the amount which I demand from you, or you must pay the right sum," the owner of the cargo could not insist upon paying the amount into a bank in the name of persons other than the shipowner, but must pay him either the amount

(1) 2 B. & C. p. 811.
(2) 5 Q. B. D. 38, 41.
(3) Br. & Lush. 377, 404, 409.
(4) Br. & Lush. 397.

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demanded, or tender that which he, the consignee, believes to be reasonable. If, however, the master had said that whatever might be the amount of the sum tendered by the consignee, he would accept nothing but a particular security, then the question would arise whether the security which he demanded was a reasonable one. If he says that he will only accept a deposit of 10 per cent. on the value of the goods, this, as a general rule, would be wholly unreasonable, though there might be cases where it would be reasonable. We must consider whether in the present case it is unreasonable having regard to the other conditions respecting it. The bond requires that the deposit shall be made in the joint names of the defendants and "their average adjuster." The word "their" clearly points to an adjuster appointed by the defendants. Then the shipowner is to have power to draw upon it from time to time for his disbursements. This includes all disbursements and payments, which in the result the shipowner will have to pay for himself. Take the case of salvage. The ship is in distress and is succoured by salvors, and the master makes a compromise with them for the payment of a large sum, and it may turn out upon the final settlement that a large part of the salvage will fall on the shipowner, and yet under the terms of the bond the master is to be at liberty to take the whole amount of the salvage out of the deposit, the only security for the repayment of what ought to be returned being the credit of the shipowner.

If the shipowner requires the consignee to enter into a bond in particular terms, the question arises whether the bond is unreasonable, and if part of what is insisted upon is unreasonable, the whole instrument is unreasonable. That the bond is unreasonable considered as one which the master may impose on the consignee is, I think, clear. First, it makes the shipowner's average adjuster an arbitrator, and that is unreasonable. Then there is a peculiar kind of appeal from the decision of the average adjuster, which prevents the parties from taking the opinion of a legal tribunal. Further, the terms of the deposit are unreasonable, inasmuch as it requires a deposit in the joint names of the representative of the shipowner and the average adjuster. Then as to the mode in which payments are to be made out of the

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deposit. The average adjuster of the shipowner is to be the judge, and what purports to be a deposit is to be drawn upon for such disbursements as these two, without the consent of the depositor, think ought to be paid to the shipowner. For these different reasons the bond is one which I think the Liverpool shipowners have no right to impose upon the owner of any cargo which arrives there.

The case does not enable us to compare this form of bond with the form called the London bond, and I therefore give no opinion as to whether the latter form is reasonable or not.

LINDLEY, L.J. I am unable to say that the decision of the Court below was wrong. The right of the master to refuse to deliver goods to a consignee unless he is paid the consignee's share of general average appears up to a certain point to be clear. I say up to a certain point, because if the amount due is paid or tendered the master cannot refuse delivery. It is unnecessary to say whether he can refuse if reasonable security is offered. But if no question of payment or tender is raised and he himself requires security, he cannot impose unreasonable terms. The question here is, can the defendants insist upon the consignees doing one of two things, to make the deposit as described in the case, or in the alternative to sign the Liverpool bond. As to the first alternative, when you ascertain that the object of the deposit is to give the master control of the money for the benefit of the shipowner I cannot think that it is reasonable. As to the second, I agree that the bond is not one which can be imposed upon a consignee against his will.

LOPES, L.J., concurred.

Judgment affirmed.

Solicitors for plaintiffs: *Waltons, Bubb, & Johnson.*

Solicitors for defendants: *Pritchard & Sons, for Thornely & Cameron, Liverpool.*

A. P. S.

1886
April 5.

IN RE THORNBURY DIVISION OF GLOUCESTERSHIRE ELECTION PETITION.

ACKERS, PETITIONER; HOWARD, RESPONDENT.

Parliament — Election—Ballot Paper—Absence of Official Mark—Validity—Ballot Act, 1872 (35 & 36 *Vict. c.* 33), *ss.* 2, 4; *rr.* 34, 36.

A ballot paper which conforms in other respects to the requirements of the Ballot Act, 1872 (35 & 36 Vict. c. 33), is not void because it has not on the face of it the official mark directed by s. 2 of that Act to be marked on both sides of the ballot paper.

Pickering v. *James* (Law Rep. 8 C. P. 489) considered.

CASE stated by Field and Day, JJ., under 31 & 32 Vict. c. 125, s. 12.

On the trial of the parliamentary election petition for the Southern or Thornbury division of the county of Gloucester, wherein Ackers was the petitioner, and Howard the respondent, a question of law arose with reference to certain ballot papers. The learned judges accordingly postponed their judgment on the petition until the determination of the question, and stated the following case:—

It was proved before us that the returning officer had at the counting of the poll, after objection taken and considered, counted 224 ballot papers for the respondent, and 49 ballot papers for the petitioner, which had been delivered to the voters respectively by the presiding officer, the same not having been marked upon the face with the official mark required by the Ballot Act.

Upon argument we affirmed such decision of the returning officer, but on the application of the petitioner we have stated this case for the opinion of the Queen's Bench Division.

The question for the opinion of the Court being whether we were right in so holding.

If the Court should be of opinion in the affirmative, the petitioner abandons any further scrutiny.

Mar. 30, 31; Apr. 1. *Matthews, Q.C.*, and *Stroud*, for the petitioner.

Gully, Q.C., and *A. T. Lawrence*, for the respondent. In this case the respondent did not consent to the case being stated. The

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learned judges gave a judgment and then stated this case by way of appeal at the request of the petitioner. No doubt, if the Court affirms the judgment given during the hearing of the petition, the judgment of this Court will determine the whole matter; but should the decision be the other way, then there will be a further inquiry. If, however, the case is to be argued before this Court at all, it will be more convenient to argue it now than to wait until judgment has been given on the petition, and then to argue this case in this Court.

[LORD COLERIDGE, C.J. As the petitioner presses for the argument of this case, and as no serious objection is offered on behalf of the respondent to that course being taken, we will hear the case now; but it must not be taken that this Court is of opinion that it was intended that the learned judges who try an election petition should reserve for this Court difficult questions which may arise during the hearing. It is not to be supposed that we create any precedent by hearing this case, or that we hold that this is the procedure which should be generally adopted. We hear this case now because it is thought convenient by both parties that the question raised should be now decided.]

Matthews, Q.C., and *Stroud*, for the petitioner. The question stated for the judgment of the Court raises the question of the construction to be placed on s. 2 of the Ballot Act, 1872 (1), which provides that "the ballot paper shall be marked on both sides

(1) 35 & 36 Vict. c. 33, s. 2: "In the case of a poll at an election the votes shall be given by ballot. The ballot of each voter shall consist of a paper (in this Act called a ballot paper) shewing the names and description of the candidates. Each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with the same number printed on the face. At the time of voting, the ballot paper shall be marked on both sides with an official mark, and delivered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil, and the voter having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding at the polling station (in this Act called the 'presiding officer') after having shewn to him the official mark at the back.

"Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back, is written or marked by which the voter can be identified, shall be void and not counted."

with an official mark," for the ballot papers, the validity of which is questioned in this case, were only so marked on the back, and had no mark on the face, so that if these ballot papers are held to be valid, the words "on both sides" will in effect be struck out of the statute.

The words "shall be" are peremptory and imperative: *Hunt* v. *Wimbledon Local Board* (1); *Young* v. *Mayor of Leamington.* (2) They are words placed in a statute conferring a franchise, and the rule of law is that a right or a franchise must be exercised strictly according to the terms of the statute or charter which creates or confers it: Comyns' Digest (tit. Franchise, F. 20, 21); *Liverpool Borough Bank* v. *Turner* (3); *City of London* v. *Vanacre* (4); *Eastern Archipelago Co.* v. *Reg.* (5) The word "shall" has always been held to be mandatory, and not merely directory, in cases relating to the time and manner of bringing appeals, as in *Wanklyn* v. *Woollett* (6), and although in several registration cases this word has been held to be only directory, that has been when it is applied to acts which are merely ministerial, as, for instance, when used in connection with certain duties of overseers and clerks of the peace under the Registration Acts: *Brumfitt* v. *Bremner* (7); *Morgan* v. *Parry.* (8)

[LORD COLERIDGE, C.J., referred to *Davis* v. *Goodman.* (9)]

In the *Oldham Case* (10) Blackburn, J., struck off a vote which was tendered at a wrong polling booth, holding that it was the fault of the voter as well as of the polling clerk, and it is equally the duty of a voter under the Ballot Act to see that the ballot paper has on it the proper official mark, and to sheir that mark as stated by Bovill, C.J., in *Pickering* v. *James.* (11)

The object of the ballot is to secure complete secrecy, and s. 4 (12) provides that every officer in attendance of the counting

(1) 4 C. P. D. 48.
(2) 8 App. Cas. 517.
(3) 2 D. F. & J. 502; 30 L. J. (Ch.) 379.
(4) 5 Mod. 438; 12 Mod. 270.
(5) 2 E. & B. 856; 23 L. J. (Q.B.) 82.
(6) 4 C. B. 86; 16 L. J. (C.P.) 144.
(7) 9 C. B. (N.S.) 1.
(8) 17 C. B. 334; 25 L. J. (C.P.) 141.
(9) 5 C. P. D. 128.
(10) 1 O'M. & H. 151, at p. 163.
(11) Law Rep. 8 C. P. 489, at p. 501.
(12) 35 & 36 Vict. c. 33, s. 4: "Every officer, clerk, and agent in attendance at a polling station, shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not

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of the votes shall maintain the secrecy of the voting, and shall not attempt to ascertain the number on the back of the ballot paper; but if, there is no official mark on the face of the ballot paper it will be necessary at the counting of the votes to look at the back, the number may then be seen and the secrecy of the ballot will be violated. Each of the two official marks prescribed by the Act has its function. The mark on the back is to be seen at the time when the vote is given, that on the front at the time of the counting, and there is no complete official mark within the meaning of the statute unless there is a mark on both sides. Rule 34 (1) requires the returning officer while counting the

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communicate, except for some purpose authorized by law before the poll is closed, to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot-paper or voted at that station or as to the official mark, and no such officer, clerk, or agent, and no person whosoever shall interfere with or attempt to interfere with a voter when marking his vote, or otherwise attempt to obtain in the polling station information as to the candidate for whom any voter in such station is about to vote or has voted, or communicate at any time to any person any information obtained in a polling station as to the candidate for whom any voter in such station is about to vote or has voted, or as to the number on the back of the ballot paper given to any voter at such station. Every officer, clerk, and agent in attendance at the counting of the votes, shall maintain and aid in maintaining the secrecy of the voting, and shall not attempt to ascertain at such counting the number on the back of any ballot paper, or communicate any information obtained at such counting as to the candidate for whom any vote is given in any particular ballot paper. No person shall directly or indirectly induce any voter to display his ballot paper after he shall have marked the same, so as to make known to any person the name of the candidate for or against whom he has so marked his vote.

"Every person who acts in contravention of the provisions of this section shall be liable on summary conviction before two justices of the peace to imprisonment for any term not exceeding six months, with or without hard labour."

(1) Rule 34: "Before the returning officer proceeds to count the votes he shall in the presence of the agents of the candidates open each ballot box, and, taking out the papers therein, shall count and record the number thereof, and then mix together the whole of the ballot papers contained in the ballot boxes. The returning officer while counting and recording the number of ballot papers and counting the votes, shall keep the ballot papers with their faces upwards, and take all proper precautions for preventing any person from seeing the numbers printed on the backs of such papers."

Rule 36: "The returning officer shall endorse 'rejected' on any ballot paper which he may reject as in-

votes to keep the ballot papers with their faces upwards, and to take precaution for preventing the numbers on the backs of the papers from being seen; but if there is no official mark on the front of the paper the returning officer must look at the back, and then there is great danger that the number will be seen: *Stowe* v. *Jolliffe*. (1) Sect. 4 shews distinctly the difference between what is to be done at the polling station and at the counting of the votes, it assumes that an agent at the polling station may know the number on the ballot paper, and if he knows this and knows the number of the voter on the register he can, if he has an opportunity of seeing the back of the ballot paper, discover how the voter voted, and thus nullify the object of the Act.

The provision as to the official mark being placed on both sides of the ballot paper is found in the body of the Act, and, as was held in *Woodward* v. *Sarsons* (2), if the enactments in the rules are directory, still the enactments in the sections in the body of the Act are absolute enactments.

The fact that s. 2 provides that a ballot paper without the official mark on the back shall be void, while there is no similar enactment with regard to a ballot paper which has not the official mark on the face of it may be relied on by the respondent on the principle expressio unius est exclusio alterius. But that maxim can seldom be applied in its broadest sense: *Eastern Archipelago Co.* v. *Reg.* (3); Broom's Legal Maxims, p. 606. Moreover, the things expressed in this statute are not exhaustive, and do not include all those matters which will avoid a vote. The provisions of s. 13 shew that a disregard of the principles laid down in the body of the Act will invalidate a vote.

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valid, and shall add to the indorsement 'rejection objected to' if an objection be in fact made by any agent to his decision. The returning officer shall report to the Clerk of the Crown in Chancery the number of ballot papers rejected and not counted by him under the several heads of:—

1. Want of official mark;
2. Voting for more candidates than entitled to;
3. Writing or mark by which voter could be identified;
4. Unmarked, or void for uncertainty;

and shall on request allow any agents of the candidates before which such report is sent to copy it."

(1) Law Rep. 9 C. P. 446.

(2) Law Rep. 10 C. P. 733.

(3) 2 E. & B. 856; 23 L. J. (Q.B.) 82.

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[LORD COLERIDGE, C.J. It is said in *Woodward* v. *Sarsons* (1), that if the requirements of the Act are substantially fulfilled then there is no enactment by which a ballot paper can be treated as void though the other directions in the statute are not strictly obeyed.]

That principle applies to the points raised and decided in that case, this question did not arise there and the decision does not cover this case.

[HAWKINS, J. Rule 36 says that the returning officer shall "indorse" rejected on any ballot paper which he rejects as invalid. Must he not then look at the back?]

But he is not to indorse it until he has decided on the question of its validity or invalidity, and that point he must decide while keeping the paper with its face upward, as ordered by r. 34.

The word "indorse" does not necessarily mean write on the back, it would suffice if the word "rejected" were written on the face of the paper, as may be seen from the cases decided on bills of exchange, which shew that an indorsement need not necessarily be on the back: *Ex parte Yates* (2); Byles on Bills, p. 152, and the provisions in the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 32.

Gully, Q.C., and *A. T. Lawrence*, for the respondent. Although this question arises in an election petition in which the petitioner and the respondent are the parties primarily interested, it must still not be forgotten that the decision will affect the rights of voters upon whom the franchise has been conferred, and it is not to be presumed that the legislature intended that their votes should be rendered void in any cases save in those with regard to which it has expressly enacted that the disregard of a provision in the Act shall have that effect.

Sect. 2 of 35 & 36 Vict. c. 33, is the section which governs this point, and it expressly enacts that three things shall render a vote void; but the contention on behalf of the petitioner seeks to alter the section by adding a fourth condition so as to make a vote void when the ballot paper has not the official mark on its face. The section makes the official mark on the back of the paper the essential mark, the mark on the face is only added as an addi-

(1) Law Rep. 10 C. P. 723, at p. 748. (2) 27 L. J. (Bkcy.) 9.

tional precaution, and the section which prescribes three conditions as being essential to a good vote, enacts in effect by implication, that all voting papers which comply with those conditions shall be held good and shall be counted. The back of the ballot paper must be looked at as it comes out of the ballot box, the official mark must then be seen, and further, the returning officer must see that there is no writing or mark by which the voter can be identified. The returning officer is the officer appointed by the Act to judge whether the ballot paper does, or does not comply with the Act. He must therefore see that there is an official mark on the back. Rule 36 follows the provisions of s. 2, and the want of official mark specified in that rule refers to the want of the essential official mark, that is the official mark on the back. The directions for the guidance of the voter given in the second schedule, also follow the provisions of s. 2, and specify the same three things as the things which will render a vote void. The want of official mark on the face is not one of those three things. There is no duty on the voter to see that there is an official mark on the face, and the direction that the voter is to shew the official mark to the presiding officer, is inserted for the protection of the voter. It cannot be inserted as a condition precedent to the validity of the vote, for the presiding officer is in no sense a judge of that. The returning officer is the sole judge, there is nothing in the Act which forbids him to look at the back of the ballot paper. Rule 34 provides for two counts and gives directions as to the proper precautions to be taken to prevent any person from seeing the number on the back of the papers. There is nothing in s. 4 directing that the ballot papers are to be kept with their faces upwards, that provision is found in rule 34, and it applies to the numbers only. The word "indorse" in rule 36 must be taken in its ordinary sense, for if the returning officer were to write across the face of the ballot paper he might very likely obliterate the mark made by the voter, the exact position of which might be an important question which would arise on a petition. Sects. 4 and 11 impose penalties for acts or omissions by officials in contravention of the statute.

In the *Wigtown Case* (1) a question arose as to the want of the

(1) 2 O'M. & H. 215, at p. 216.

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official mark, and Lord Ormidale expressed an opinion that the only duty imposed on the voter is to see that the ballot paper has the official mark on the back.

[They were stopped.]

Stroud, in reply.

April 5. The judgment of the Court (Lord Coleridge, C.J., Hawkins and Mathew, JJ.), was delivered by

HAWKINS, J. The only question for our decision is whether it is essential to the validity of a vote given under the Ballot Act, 1872, for a candidate for election to serve in parliament that the ballot paper on which such vote is given shall be marked on both sides with an official mark as prescribed by section 2 of that Act, or whether it is sufficient, so far as the validity of the vote is concerned, if the back of the ballot paper is so marked. At the trial of this election petition before Field and Day, JJ., no less than 273 votes were objected to on one side or the other on the ground that the ballot-papers on which such votes were given, though duly marked on the back, have no official mark on the face. These objections were overruled by the learned election judges, who, however, granted a case for the opinion of this Court. The case was exhaustively argued before us by Mr. H. Matthews and Mr. Stroud in support of the objection, and by Mr. Gully and Mr. Lawrence against it. It ought to be stated that this being a special case only one counsel had a right to be heard. It was only under very exceptional circumstances, and as a matter of great indulgence, that the Court heard two counsel for the petitioner.

We have arrived at the conclusion that the judgment of the election judges is right, and that the votes are good. In considering the construction to be put upon the various provisions in the Ballot Act, it should be borne in mind that no enactment contained in it affects the franchise; the Act relates to procedure alone. The right to vote exists exactly as it did before that Act was passed: that Act merely directs the mode in which the vote shall be given, the main object of it being to ensure, as far as possible, secrecy.

In construing the provisions contained in the body of the Act,

regard must also be had to the schedules which comprise rules for parliamentary elections, forms to be used and directions for the guidance of voters, for by s. 28 of the Act it is expressly enacted that "the schedules to this Act and the notes thereto and directions therein, shall be construed and have effect as part of this Act."

Before referring to the 2nd section, which prescribes the mode in which the ballot is to be taken, it will be convenient to have a clear understanding of the officers to be engaged, the duties imposed upon them respectively, and the machinery, &c., to be provided for the conduct of a parliamentary election. In the first place the duty of taking the poll in the event of more candidates being nominated than there are vacancies to be filled up is by s. 1, par. 2, cast upon the returning officer, and he is to take such poll in the manner prescribed by the Act. By rule 15 he is to provide a sufficient number of polling stations. By rule 16 each polling station is to be furnished with compartments in "which the voters can mark their votes screened from observation." By s. 8, coupled with rule 20, the returning officer is to provide, inter alia, ballot boxes, ballot papers; stamping instruments, described in the rule as "instruments for stamping thereon" (that is, on the ballot-papers), "the official mark" (hereafter referred to); copies of the register of voters and materials for voters to mark the ballot papers.

By rule 21 it is provided that he shall appoint a presiding officer to preside at each polling station, and by s. 8 he is required to appoint and pay such officers as may be necessary for effectually conducting the election. The 9th section and the 21st rule impose upon the presiding officer the duty to keep order at his station.

The 10th section invests the presiding officer with the powers of a deputy returning officer in matters relating to the poll, and the same section vests in him and any clerk appointed by the returning officer to attend a polling station, power to ask the questions and administer the oath authorized by law to be asked of and administered to voters.

Rule 50 provides that the presiding officer may do, by the clerks appointed (i.e., by the returning officer) to assist him, any

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act which he is required or authorized to do at a polling station; except order the arrest, exclusion, or ejection of any person from the polling station. With this machinery provided, and these officers appointed and in attendance, let us now see how a voter on the register entitled to record his vote is to proceed. A voter can only record his vote upon a ballot paper provided for him by the returning officer and handed to him in the polling station. The form of such ballot paper is prescribed by the 2nd schedule to the Act. It is to be attached to a counterfoil; the front or face of the ballot paper must contain a list of the candidates, shewing their names and descriptions and arranged alphabetically in the order of their surnames (s. 2 and rule 22). On each ballot paper a number is to be printed on the back; and each counterfoil is to have a corresponding number printed on the face (s. 2). The first step for a voter to take is to apply at his polling station for a ballot paper; this is equivalent to tendering his vote (s. 15). Before he is entitled to have a ballot paper furnished to him, the voter claiming must give his name and description to the presiding officer, or some clerk appointed by the returning officer for that purpose; and thereupon such presiding officer or clerk ought to turn to the register of voters, and if he finds the name of the voter in such register his duty is to call out the number, name, and description of such voter as stated in the register (rule 24), so that all present may know that the person being or claiming to be the individual so named has applied for and is about to receive a ballot paper. This really gives no more information to anybody than that A. B. or C. D., or somebody claiming to be A. B. or C. D., and numbered so and so in the register is about to vote. It calls attention to the person of the individual who claims to vote in that name and gives facility for proof in case of alleged personation. The register number of the claiming voter is then to be marked by the officer or clerk on the counterfoil. This being done no difficulty (except in cases of personation where identity is disputed) can afterwards arise in tracing each ballot paper to the voter to whom it is delivered, for the number on the back of the ballot paper would enable reference to be made to the counterfoil from which it was torn, while the register number marked on the face

of the counterfoil would enable reference to be made to the register itself, where the name, &c., of the voter would be found. Before however a ballot paper is delivered to an intending voter it is required by s. 2 and rule 24 that immediately before it is delivered to the elector it shall be marked on both sides with the official mark either stamped or perforated. The duty so to mark or to see that each ballot paper is so marked before it is delivered to the voter clearly lies on the presiding officer or a clerk appointed for that purpose: *Pickering* v. *James*. (1) The voter has no such obligation cast upon him, he is only required by s. 2 to shew the official mark on the back to the presiding officer before he puts it in the box. Rule 25 requires that on the receipt of the ballot paper the voter shall go into one of the compartments and there mark his paper and fold it up so as to conceal his vote, and then put his ballot-paper so folded up into the ballot box, and quit the polling station. Sect. 2 of the Act however requires that the voter shall place his ballot paper in the box in the presence of the presiding officer, "after having shewn to him the official mark at the back."

What this official mark is to be is clearly within the discretion of the returning officer; but it is clear the legislature intended it should be a secret mark, for rule 20 requires that the returning officer shall keep it secret, and that an interval of not less than seven years shall intervene before it is again used for the same purpose.

The object being to keep the official mark a profound secret, there being no provision for making it known even to the voter himself, it is a little extraordinary that the voter should be required so to fold his ballot paper as to expose that mark on the back of the paper, and to shew it to the presiding officer. Yet this is directed by s. 2 of the Act, and the second paragraph of that section makes void any vote recorded on a ballot paper which has not on its back the official mark.

Now it is clear that the votes under discussion in this case do not fall within this objection, for the ballot papers have on their backs the official mark.

Mr. Matthews, however, very strenuously contended that it was

(1) Law Rep. 8 C. P. 489.

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equally essential that the official mark should appear upon the face of the paper, and he insisted that the only inspection of the back of the ballot paper permitted by law was the inspection of the official mark required to be shewn to the presiding officer immediately before its being placed in the ballot box, and that any inspection of or reference to the back of the paper after once it was deposited in the box, was contrary to the provisions and spirit of the Act, for that to refer to the back would practically be to enable the party so inspecting to gain knowledge of the number of the counterfoil, and with that knowledge to ascertain the register number and name of the voter, and, following out this argument, he urged that after the deposit in the box the face alone could be inspected, and therefore it was essential that the official mark should there appear to establish the authenticity of the paper and its identity with that delivered out to the voter, which was the sole object of the legislature in requiring an official mark to be placed on the paper. We are unable to take this view of the case. As a matter of fact, it would be practically impossible for the returning officer to fulfil the duty imposed on him by s. 2 after the close of the poll, without having inspection of the backs of the ballot papers. They are required to be put into the box folded so as to conceal the vote and to expose the official mark on the back. In the box, therefore, the backs alone are exposed.

By rule 34, before the returning officer proceeds to count the votes in the presence of the agents of the candidates, he is required to open each ballot box and take out the papers therein, count the numbers thereof, and mix the whole of the papers together. To do this, he and the agents must of necessity see the papers folded with only the backs exposed as they were placed in the box. It is true that from such an inspection it is to the last degree improbable that any useful information could be obtained. Then, again, the result of the poll is to be ascertained by counting the votes given to each candidate (s. 2). Rule 34 requires the returning officer, while counting and recording the number of ballot papers and counting the votes, to keep the ballot papers with their faces upwards, and take all proper precautions for preventing any person from seeing the numbers printed on the backs

of such papers. Now in order to fulfil the requirements of this rule it is absolutely necessary that the folded papers should be opened in order to expose their faces, and in opening them it is impossible to avoid seeing the backs. Moreover, the rule does not say, nor does any section in the Act, that the returning officer or the agents shall not see the backs. It rather assumes that they must and will see the backs of the papers, and enjoins upon the returning officer the duty to take all proper precautions to prevent the numbers being seen. There is still another matter to be noticed which appears conclusively to shew that the returning officer has not only the right, but that the duty is cast upon him, to examine both sides of the ballot papers before he declares the result of the poll. It is his duty to count the votes, and the second paragraph of s. 2 expressly enacts that he shall not count, inter alia, any ballot paper which has not on its back the official mark, and that a ballot paper open to this objection shall be void. In determining whether a ballot paper is void or ought not to be counted the returning officer acts judicially, and his decision is declared by s. 2 to be final, subject only to reversal on petition questioning the election or return. How can a returning officer discharge his duty and give his decision respecting an objection depending upon something which is alleged to exist on, or be omitted from the back of the ballot paper, without inspecting the back of the paper? To us the question seems to answer itself. Lastly, by rule 36 the returning officer is required to indorse "rejected" on any ballot paper he may reject as invalid. Mr. Stroud ingeniously argued that this rule does not mean that the word "rejected" shall be written on the back but on the face of the paper. If this is the meaning of the rule, all we can say is that the legislature has selected an unfortunate word to express its intention, for both in Walker's and Webster's dictionaries the meaning of the verb "to indorse" is defined "to write on the back." This is the construction we place on the word used in rule 36. It follows, that in order to indorse the ballot paper the returning officer must see the back of it.

It is not necessary for the decision of the present case for us to determine whether or not it is the duty of the presiding officer to look at the ballot paper of a voter and see that it is marked with

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the official mark before it is placed in the box; nor what course he should pursue if a voter attempted to put in the ballot box a voting paper which is obviously without an official mark. This is a matter upon which the judges of the Court of Common Pleas were equally divided in the case of *Pickering* v. *James* (1), Bovill, C.J., and Grove, J., entertaining the opinion that no such duty is cast upon the presiding officer, Keating and Brett, JJ., entertaining the opposite view. We think it right, however, to say that we adopt the latter view, which certainly is most in accordance with what seems to us to have been the intention of the legislature. Why a voter should be required to shew the official mark at the back of his voting paper to the presiding officer, if that officer was not bound to look at it or to take any action in the event of his seeing that the voter had either mistaken the mark or was endeavouring to palm off a spurious mark, we are at a loss to imagine. On the other hand, if the presiding officer having the duty cast upon him to see that each paper is properly marked before it enters the box, sees on its presentment by the voter that inadvertently a ballot paper has been delivered, but without the official mark, he can at once rectify the inadvertence and prevent the loss of an honest vote by informing the voter of the omission, cancelling the unstamped paper (of course being first satisfied it is in fact the genuine paper delivered out to the voter), and delivering out to him another paper duly stamped upon which he may effectually record his vote. Whether if the voter insists upon a ballot paper, which the presiding officer thinks is void for want of an official stamp, being deposited in the box, the presiding officer has a right to refuse to allow it to be so deposited, is a question open to grave argument; for the returning officer alone is appointed to decide respecting the validity of any ballot paper, and it may be that, though irregular, the presiding officer is bound to admit it, leaving it to the returning officer on the counting to decide whether it ought to be rejected or otherwise dealt with. Upon this point, therefore, we abstain from offering any opinion. In this case the question is not whether the presiding officer, or those to whom the conduct of the election was intrusted, have in all respects

(1) Law Rep. 8 C. P. 489.

discharged the duty cast upon them, but whether by reason simply of the omission to stamp the ballot papers on the faces (the marks on the back being admittedly regular), the voters have lost their votes.

We are of opinion they have not. They have, in our opinion, complied with every requirement of the statute and the rules, and have strictly followed the directions prescribed in schedule 2 for their guidance.

Having done this, to hold that their votes are void by reason of an omission not pointed out as material either by statute, rules, or directions, would be to hold that the statute, rules and directions were but false misleading guides to the observance of the obligations enjoined by law; this we are not prepared to do. If the legislature had intended that the absence of the official mark from the face of the ballot paper should avoid the vote, it is impossible to suppose that in declaring in the second section what votes shall be void and not counted, it would have confined itself to the absence of the mark on the back. It would be difficult to suggest a case to which the maxim so often quoted during the argument, "Expressio unius est exclusio alterius," could be more justly and fittingly applied.

For the reasons we have given, we adjudge the votes to be good, and affirm the decision of the election judges. The costs must be paid by the petitioner.

Judgment accordingly; leave to appeal refused.

Solicitors for petitioner: *Doyle & Sons, for Taynton, Gloucester.*

Solicitors for respondent: *Meredith, Roberts, & Mills, for Gwynn & Gwynn, Bristol.*

R. B. R.

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March 12.

THE WEST NORFOLK FARMERS' MANURE CO., LIMITED *v.* ARCHDALE AND OTHERS.

Sewers, Commissioners of—Walls, Banks, and Defences against the Sea, Jurisdiction over—Evidence of Exercise of Jurisdiction—Property vesting in Commissioners—Land Drainage Act, 1833 (3 & 4 *Wm.* 4, *c.* 22), *ss.* 10, 47.

Sect. 10 of the Land Drainage Act, 1833 (3 & 4 Wm. 4, c. 22), which declares that certain walls, banks, and other defences by the coasts of the sea and navigable and tidal rivers are within and subject to the jurisdiction of commissioners of sewers does not of itself vest such defences in the commissioners, and in order to shew that any wall or other defence is vested in the commissioners, it must be proved that they have in fact exercised jurisdiction over it.

APPEAL by the plaintiffs from the refusal by the Queen's Bench Division to set aside a verdict and judgment for one of the defendants, and a judgment of nonsuit for the other two defendants.

The plaintiffs were owners and occupiers of a piece of land adjoining the River Nar in the county of Norfolk, and the defendant Archdale was owner and the defendant Rands occupier of other land adjoining the river. The third defendant was Archdale's agent. The plaintiffs alleged that the River Nar was a tidal navigable river, and that a bank on the land of the defendant Archdale was an ancient bank erected and maintained for the purpose of preventing the waters of the River Nar from overflowing the lands of neighbouring proprietors on the same level, and that the bank was under the jurisdiction of the commissioners of sewers for the county of Norfolk in pursuance of statutes relating to the maintenance of sewers. The plaintiffs also alleged that the defendants wrongfully cut down and destroyed a portion of the bank, by reason of which water flowed over the plaintiffs' land and caused injury to the plaintiffs. The claim against Archdale was also framed in the alternative on prescription. At the trial before Baron Huddleston it was shewn that the bank had been lowered in one place in the year 1873, but it is unnecessary for the purposes of this report to deal with the facts of the case further than to say there was a second bank nearer to the river than that which was cut. The learned judge was of opinion that there was no evidence of liability on the part of the defendant Archdale, and further, that the cutting

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of the bank was not shewn to be actionable, as there was no evidence that the bank was under the jurisdiction of the commissioners of sewers. He accordingly directed a verdict for Archdale, and entered judgment for him, and entered judgment of nonsuit as to the other two defendants. On a motion in the Queen's Bench Division, Mathew and A. L. Smith, JJ., refused to set aside the verdict and nonsuit.

The plaintiffs appealed.

Lumley Smith, Q.C., and *A. Macpherson*, for the plaintiffs. It was not necessary to shew by direct evidence that the commissioners had exercised any jurisdiction over the bank. A commission was put in which vested in the commissioners of sewers "all" the banks in the county of Norfolk, so that it was clearly their duty to exercise control over this bank. Looking at s. 10 (1) of the Land Drainage Act, 1833 (3 & 4 Wm. 4, c. 22), jurisdiction in such a case is given to the commissioners for all purposes, and in the absence of evidence to the contrary it must be assumed that they have exercised their jurisdiction. *Att. Gen.* v. *Tomline* (2) is therefore an authority that it was a wrongful act on the part of the defendants to interfere with this bank, per James, L.J. (3),

(1) 3 & 4 Wm. 4, c. 22, s. 10: "And whereas doubts have arisen as to the extent of the jurisdiction of commissioners of sewers: Be it therefore further enacted and declared, that all walls, banks, culverts, and other defences whatsoever, whether natural or artificial, situate or being by the coasts of the sea, and all rivers, streams, sewers, and watercourses which now are or hereafter shall or may be navigable, or in which the tide now does or hereafter shall or may ebb and flow, or which now do or hereafter shall or may directly or indirectly communicate with any such navigable or tide river, stream, or sewer, and all walls, banks, culverts, bridges, dams, floodgates, and other works erected or to be erected in, upon, over, or adjoining to any such rivers, streams, sewers, or watercourses, shall be from henceforth, to all intents, constructions, and purposes, within and subject to the jurisdiction of commissioners of sewers: Provided always, that nothing herein contained shall authorize or empower any commissioners of sewers to exercise authority or jurisdiction upon or over any dams, flood-gates, or other works erected for the purpose of ornament, previous to the passing of this Act, in, upon, or over any rivers, streams, ditches, gutters, sewers, or watercourses near or contiguous to any house or building, or in any garden, yard, paddock, park, planted walk, or avenue to a house, without the consent in writing of the owner or proprietor thereof respectively first had and obtained."

(2) 14 Ch. D. 58.

(3) At page 62.

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for which wrongful act the plaintiffs having sustained damage could maintain an action.

Wightman Wood, (*Murphy, Q.C.*, with him). Sect. 10 of the Land Drainage Act, 1833, was passed to remove doubts as to the extent of the jurisdiction of commissioners of sewers. It does not vest anything in the commissioners, but gives power to exercise jurisdiction. The commissioners can proceed, according to Callis (1), in three ways, either by summoning a jury, or on survey, or in their discretion. If it is said they have exercised their discretion, some acts done by them must be adduced to shew this. Where it is intended to vest any property in the commissioners it is so stated in terms, as in s. 47 of the same statute. (2)

Lumley Smith, Q.C., in reply. Under s. 10 the commissioners may, though the property is not vested in them, have jurisdiction, and, if they have, there has been a wrongful interference with their property.

LORD ESHER, M.R. The only way in which this action could be maintained against the defendants would be if it could be

(1) Callis on Sewers, 108 et seq.

(2) Sect. 47: "That the property of and in all lands, tenements, hereditaments, buildings, erections, works, and other things which shall have been or shall hereafter be purchased, obtained, erected, constructed, and made by or by the order of, or which are or shall be within or under the view, cognizance, or management of any commissioners of sewers, with the several conveniences and appurtenances thereunto respectively belonging, and also all and singular the goods, tools, utensils, materials, and things whatsoever had, and to be had, bought, procured, or provided by or by the order of, or which are or shall be within or under the view, cognizance, or management of such commissioners, shall be and the same are hereby vested in the commissioners of sewers within or under whose view, cognizance, or management such lands, tenements, hereditaments, buildings, erections, works, goods, tools, utensils, materials and things shall respectively be, who are hereby empowered to bring or cause to be brought any action or actions, or to prefer or order the preferring of any bill or bills of indictment, against any person who shall dig up, break, or pull down, damage, destroy, injure, spoil, steal, take, or carry away, or wilfully and wrongfully buy or receive, any such lands, tenements, hereditaments, buildings, erections, works, goods, tools, utensils, materials, and things whatsoever as aforesaid, or any part thereof; and in every such action and indictment the said lands, tenements, hereditaments, buildings, erections, works, goods, tools, utensils, materials, and things shall be laid or described to be the property of the said commissioners, without stating or specifying the name or names of all or any of such commissioners."

shewn that the bank which they cut was within the jurisdiction of the commissioners of sewers in this sense, that it was a bank which had come under the exercise of their jurisdiction. In that case if the defendants cut the bank, and by that wrongful act injured the plaintiffs, they would be liable. The commencement of that proposition is, that the bank which was cut was so far vested in the commissioners of sewers for the benefit of the public that it was their duty to have kept it up.

Now it is said that s. 10 of 3 & 4 Will. 4, c. 22, did give them that interest in and duty with regard to the bank, but when you look at that section, and at s. 47, so as to construe the Act, it seems to me that Mr. Wightman Wood's argument is conclusive, and that s. 10 only shews what banks the commissioners may, if they take the proper steps, bring within the exercise of their jurisdiction; and it is only the banks which they have brought within the exercise of their jurisdiction with regard to which it can be said that those banks are vested in them by public authority for the purpose of protection.

Now here, if we assume that the bank in question is the protective bank from the waters of a tidal river, there is no evidence that the commissioners have ever "taken to" it as a bank within their jurisdiction. In that view of the matter the bank would be a bank within s. 10, and one which therefore the commissioners might have taken within their jurisdiction, but there would be no evidence that they ever had done so. I cannot but think that that has been always the construction of the statute, although that construction has not hitherto, as far as I can see, been expressly determined in any case; because I cannot but think that the invariable practice in such cases as this has been to shew not merely that the bank existed but that the commissioners of sewers have done something to it which shewed that they had "taken to" it. If it can be shewn that their servants have done things with regard to it, or have inspected it, that would be enough—any evidence to shew that they have adopted it, will be sufficient; but here there is no evidence of that sort. Upon that ground, even assuming this to be a bank which would protect the country from the river, it seems to me there was no case to go to the jury.

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The second point which has been taken by the defendants is I think a strong one; but it is not necessary to decide it. There were two banks—what has been called the "outer" bank and the "inner" bank—and there was no evidence to shew which was really the protecting bank. It is for the plaintiffs to prove their case. If they shew there are two banks, either of which may be the protecting one, they have not gone far enough. They ought to shew that the bank which was cut was the protecting bank. However, I do not consider it necessary to deal with this, for it seems to me that on the legal point the defendants are right as to the construction of the statute. I think, therefore, that the appeal fails, and that the judgment of the Divisional Court must be affirmed.

I may say, with regard to the case of *Att.-Gen.* v. *Tomline* (1), it seems to me that the effect of it has been exaggerated, and that the doctrine there established was meant to apply to natural protecting banks against the sea and the waters of tidal rivers.

LINDLEY, L.J. This case must turn upon the true construction of ss. 10 and 47 of the Land Drainage Act of 1833. When that Act passed, as I understand, that which is called the "outer" bank and the bank as to which this dispute has arisen both existed as they are now. I should not myself be prepared to say, upon the evidence which is before us, that the commissioners of sewers might not have exercised jurisdiction over this inner bank within the statute of 1833, on the ground that the outside bank was no effectual bank at all, and that the inside bank was, in fact, an adjoining bank within the meaning of s. 10. I do not mean to decide that one way or the other; but assuming that the commissioners might have come to the conclusion that this inner bank was the substantial defence, and therefore that it was within s. 10, I am satisfied that it is necessary for them to bring it within their jurisdiction by doing some act which evidences the fact that they regard it as one of those matters which they ought to attend to. I admit this is not clear from s. 10 alone, but it appears to me we can and ought to arrive at this conclusion, taking s. 10 in connection with s. 47.

(1) 14 Ch. D. 58.

All that s. 10 says is, "that the walls, banks, culverts, ditches, and other works mentioned, shall be from henceforth, to all intents, constructions and purposes whatever, subject to the jurisdiction of the commissioners." This does not do more than is expressed, that is, it gives the power, as I understand, to the commissioners to take to these things if, in their judgment, it is necessary or expedient to do so.

Then s. 47 points to the vesting of property. It deals with lands, tenements, hereditaments, buildings, erections, works, and other things, which shall have been or shall hereafter be "purchased, obtained,"—that is, otherwise than by purchase, by grant or arrangement for instance—"erected, constructed, and made by or by the order of, or which are or shall be under the view cognizance, or management of"—not subject to the jurisdiction which is provided for by s. 10, but a different phrase is adopted —"under the view, cognizance, or management of the commissioners;" and vested this property in them. Then it makes it an indictable offence to meddle with the thing so vested.

There undoubtedly was, in this case, no proof whatever that this bank—assuming, as I do for a moment, it is within s. 10—was a bank which had been purchased, or obtained, or erected, constructed, or made by the commissioners, nor was there any evidence at all that it was, in point of fact, "in or under the view, cognizance, or management of the commissioners." It appears to me that that is where the plaintiffs' case breaks down. I do not think they can put their case so high as this, that if a person cuts through an internal bank, which may or may not be a protecting bank, but which, at any rate, is not shewn to be a bank which the commissioners have either purchased, or obtained, or taken under their management, cognizance, or purview, the act is wrongful as affecting the public rights of the commissioners. It appears to me that the plaintiffs do not make out their case on that. I say nothing about the other points.

LOPES, L.J. The plaintiffs in this action cannot succeed unless they can shew that the bank in question was subject to the jurisdiction of the commissioners of sewers for the benefit of the public.

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WEST NORFOLK FARMERS' MANURE CO. v. ARCHDALE.

Lopes, L.J.

There is a question raised with regard to the construction of ss. 10 and 47 of 3 & 4 Wm. 4, c. 22. I think that Mr. Wightman Wood has put the true construction on those two sections. I do not think that the effect of those sections is that every bank when erected adjoining the sea or a navigable river (such a bank as is described in s. 10), ipso facto vests in the commissioners. I think the proper conclusion to be deduced from these two sections is, that such a bank does not ipso facto vest, but that the commissioners must do something to bring it within their jurisdiction. If that be so, it disposes of this case, because there is no evidence to shew that the commissioners of sewers ever took to either of these banks.

There is only one other observation I desire to make, and that is with regard to the case of *Att.-Gen.* v. *Tomline* (1), which has been cited to us. I quite agree with what has fallen from the Master of the Rolls, that that case only applies to the natural protecting banks, or to banks erected by the Crown, either under the Crown itself or through the agency of the commissioners of sewers.

I think, therefore, that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Andrew Wood & Glasier, for Glasier, Lynn.*

Solicitors for defendants: *Field, Roscoe & Co., for Partridge & Co., Lynn.*

(1) 14 Ch. D. 58.

A. M.

GINNETT *v.* WHITTINGHAM.

1885
July 4.
1886
Jan. 13.

University—Oxford—Conusance of Action—Charter, Construction of—Jurisdiction of Chancellor's Court—Plaintiff resident out of City of Oxford.

In an action for libels alleged to have been published in London, the defendant was a resident undergraduate member of Oxford University: the plaintiff resided in London and had no connection with the university. The Chancellor of the University having claimed conusance of the action in his Court under the Oxford Charter of 14 Hen. 8, confirmed by statute 13 Eliz.:—

Held, that the privilege of the charter extended to cases in which the plaintiff resided outside the limits of the city of Oxford, and therefore that the claim must be allowed.

MOTION, on behalf of the Chancellor of the University of Oxford, that a claim of conusance of the action *Ginnett* v. *Whittingham* might be allowed.

The statement of claim, delivered the 7th of May, 1885, alleged that the defendant on certain specified days in March, 1885, falsely and maliciously published concerning the plaintiff, and of him in relation to his business as a circus proprietor, certain libellous statements (therein set out); that some of those statements were published in the *Daily Chronicle* newspaper published in London; others in the *Pall Mall Gazette* newspaper published in London; in the *Pall Mall Budget* (which was a weekly edition of the *Pall Mall Gazette* for country, colonial, and foreign readers) published in London; and in other newspapers.

The following facts appeared from the affidavits used at the hearing of the motion:—

The defendant before and at the time of the accruing of the alleged cause of action was, and thence continually had been, a privileged person of the University of Oxford, that is to say, an undergraduate member of Worcester College, Oxford, dwelling, abiding, and residing within the same university, and therein matriculated. The writ of summons was served upon the defendant within the limits of the university.

The plaintiff was not, and never had been, entitled to any privilege of the University of Oxford, and was not nor ever had been a member of or resident in the university, or a citizen of or resident in the town of Oxford, or the suburbs, hundreds, or counties of Oxford and Berks.

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The writ in the action was issued on the 16th of April, 1885, and served upon the defendant on the 21st of April.

The defendant appeared by his guardian and next friend.

The action was first brought to the notice of the solicitor to the university, who was also the registrar of the Chancellor's Court, on the 25th of April, 1885, when the copy writ was shewn to him by the defendant's guardian. On the 27th of April the solicitor to the university, having taken instructions from the Vice-Chancellor, wrote to the plaintiff's solicitors, informing them that it was intended on behalf of the chancellor to claim consuance of the action.

The defendant required a statement of claim, which was delivered on the 7th of May.

Further correspondence by letters and telegrams passed between the solicitor to the university and the plaintiff's solicitors, and some interviews took place between them in respect of the claim of conusance. Finally, on May the 11th, after the matter had been considered by the Hebdomadal Council of the university, the solicitor to the university was instructed by the Vice-Chancellor to take formal proceedings in order to enforce the claim.

On the 12th of May a power of attorney under the seal of the office of the Chancellor of the University of Oxford was given to the solicitor to claim conusance of the action in the Chancellor's Court.

On the 13th of May notice of this motion was served upon the plaintiff.

The time for delivering statement of defence was enlarged by consent of the plaintiff's solicitors.

The affidavits also stated particulars with respect to the constitution of, and the practice and procedure in, the Chancellor's Court, and the facilities existing in that court for obtaining the assistance of advocates.

The claim to conusance was made under the charter of 14 Hen. 8, set forth in the "Registrum Privilegiorum Almæ Universitatis Oxoniensis" (Oxon. 1770). The clauses under which exclusive jurisdiction in personal actions was claimed on behalf of the university were as follows:—

"Sect. 35. Et quod idem cancellarius commissarius ejusve deputatus et eorum successores seu senescallus subsenescallus et

alii judices per dictum cancellarium in forma predicta deputati tam de hujusmodi transgressionibus et malefactis predictis quam de mesprisionibus extorcionibus conspiracionibus confederacionibus manutenenciis falsis allegancciis compotis contractibus et injuriis quibuscumque, et omnibus aliis articulis qui poterunt cadere in finem vel redempcionem, seu in aliam pœnam pecuniariam, ac de aliis contractibus placitis et querelis personalibus, et aliis causis et materiis quibuscumque quocumque nomine censeantur seu censeri poterunt, licet tangant nos heredes vel successores nostros, assisis et placitis de libero tenemento duntaxat exceptis, infra villam Oxon suburbia hundreda aut comitatus predictos vel alibi infra regnum nostram Angliæ qualitercumque emergentibus factis sive perpetratis aut faciendis sive perpetrandis tam ad sectam nostram heredum et successorum nostrorum quam ad sectam partis vel alio modo quocumque ubi scolares aut eorum servientes seu ministri aut aliquæ aliæ personæ quo aliquo privilegio dictæ universitatis gaudere debeant vel debeat quos vel quem predicti cancellarius commissarius ejusve locum tenens sive eorum successores calumpniare voluerint est vel erit una parcium per scolares seu eorum servientes aut laicas gentes ejusdem villæ Oxon aut per alios inquirant et inquirere possint, et plenam cognicionem et correccionem inde habeant, et hujusmodi placita querelas causas et materias in quocumque loco infra villam nostram Oxon aut suburbia ejusdem aut procinctum universitatis predictæ eis placuerit, et execucionibus inde secundum eorum statuta et consuetudines vel secundum legem regni nostri Angliæ ad voluntatem predictorum cancellarii commissarii sive ejus deputati et successorum suorum faciant. Ac omnes et singulos articulos causas materias et querelas exceptis pre-exceptis audiant et terminent.

"Sect. 36. Ac omnia et omnimoda amerciamenta exitus forisfacturas et prosicua inde provenencia ad commodum et utilitatem universitatis predictæ habeant levent et percipiant per se et deputatos suos imperpetuum.

"Sect. 37. Ita quod nullus justiciarius ad placita coram nobis seu heredibus nostris tenenda assignatus vel assignandus justiciarius de communi Banco Justiciarius ad assisas capiendas vel gaolas deliberandas vel custodes pacis seu justiciarii servientum

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laboratorum et artificum seu alii justiciarii vel judices quicumque senescallus vel marescallus vel clericus mercati hospicii nostri vel heredum nostrorum vicecomes major ballivus seu alius officiarius vel minister noster vel heredum nostrorum quicumque de hujusmodi placitis querelis contractibus articulis causis materiis vel aliis rebus predictis seu eorum aliquo exceptis pre-exceptis infra dictam villam Oxon suburbia seu procinctum ejusdem vel alibi infra regnum nostrum Angliæ factis vel faciendis in presencia nec absencia nostri vel heredum nostrorum se in aliquo intromittant."

The following translation of the above clauses was used during the arguments in the Queen's Bench Division:—

Sect. 35: "And that the said chancellor, commissary, or his deputy and their successors, or the steward, under-steward, and other judges deputed by the said chancellor in form aforesaid, inquire and have power to make inquiry by means of scholars or their servants, or lay people of the same town of Oxford, or by means of others, as well concerning the aforesaid crimes and misdeeds of this kind as concerning misprisions, extortions, conspiracies, confederations, maintenancies, false allegations, statements of accounts, contracts, and wrongs of any sort, and all other articles which can be punished by a fine or redemption or other pecuniary penalty, and concerning other contracts, pleas, and plaints personal, and other causes and matters of any kind whatever, under whatever name they are reckoned or can be reckoned, although they affect Us, our heirs or successors (assizes and pleas of freehold alone being excepted) in any way whatever arising, done, or perpetrated, or to be done or perpetrated, within the aforesaid town of Oxford, suburbs, hundreds, or counties, or elsewhere within Our kingdom of England, as well at the suit of Us, our heirs and successors, as at the suit of a party, or in any other way whatever, in which scholars or their successors or attendants, or other persons who have or has the right to rejoice in any privilege of the said university, whom the aforesaid chancellor, commissary, or his locum tenens, or their successors, shall wish to summon (calumpniare), are or shall be one of the parties. And they shall have full cognizance and correction resulting from such [inquiry], and they shall make pleas, plaints,

causes, matters of this kind, in whatever place within our town of Oxford, or the suburbs of the same or the precinct of the aforesaid university it shall please them, and [they shall carry them out] by means of executions resulting therefrom according to their statutes and customs, or according to the law of Our kingdom of England, at the will of the aforesaid chancellor, commissary, or his deputy, or their successors. And all and singular articles, causes, matters, and plaints, except those which have been before excepted, they shall hear and determine.

Sect. 36: "And all and all manner of amercements, issues, forfeits, and profits arising therefrom they shall have, levy, and collect for the advantage and use of the aforesaid university by means of themselves and their deputies for ever.

Sect. 37: "In such a way that no justice appointed or to be appointed for the holding of pleas before Us or our heirs, [no] justice of the Common Bench, justice for holding assizes or the delivery of gaols, or guardians of the peace, or justices of servants, labourers, and artificers, or other justices or judges of any kind, [or] steward or marshal or clerk of the market of our household, or [the household] of our heirs, [or] sheriff, mayor, bailiff, or other officer or servant of Us or our heirs of any sort, shall introduce himself in any matter concerning pleas of this kind, plaints, contracts, articles, causes, or other things aforesaid, or concerning any one of them, excepting what has been before excepted, made or to be made within the said town of Oxford, the suburbs or precinct of the same, or elsewhere within Our kingdom of England, in the presence nor in the absence of Us or our heirs."

By statute of 13 Eliz. it was enacted that the charter granted to the University of Oxford by letters patent in the 13th year of Henry VIII., and also the charter granted by letters patent in the 3rd year of Elizabeth to the University of Cambridge, "shall from henceforth be good, effectual, and available in the law to all intents, constructions, and purposes," to the chancellor, masters, and scholars of either of the said universities, and to their successors for evermore, "after and according to the form, words, sentences, and true meaning of every of the same letters patent as amply, fully, and largely as if the same letters patent were recited verbatim in this present Act of Parliament, any-

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thing to the contrary in any wise notwithstanding." And it was further enacted that the chancellor, masters, and scholars of either of the said universities severally, and their successors for ever, "shall and may severally have, hold, possess, enjoy, and use, to them and to their successors for evermore, all manner of manors, lordships, rectories, parsonages, lands," &c., "and all manner of liberties, franchises, immunities, quittances, and privileges, view of frank-pledge, law days, and other things whatsoever they may be, the which either of the said corporated bodies of either of the said universities had, held, occupied, or enjoyed, or of right ought to have had, used, occupied, or enjoyed at any time or times before the making of this Act of Parliament, according to the true intent and meaning as well of the said letters patent made by . . . . Henry VIII., made and granted to the chancellor and scholars of the University of Oxford, . . . as by the letters patent of the Queen's Majesty made and granted unto the chancellor, masters, and scholars of the University of Cambridge." And it was also enacted "that, as well the said letters patent of . . . Henry VIII. . . . as the letters patent of the Queen's Majesty aforesaid, ... and all other letters patent by any of the progenitors and predecessors of her Highness, and all manner of liberties, franchises, immunities, quittances, and privileges, leetes, law days, and other things whatsoever therein expressed . . . be, and by virtue of this present Act shall be, from henceforth ratified, stablished, and confirmed unto the said chancellor, masters, and scholars of either of the said universities, and to their successors for ever, any statute, law, usage, custom, construction, or other thing to the contrary in any wise notwithstanding."

H. Davey, Q.C. (*R. S. Wright* and *Asquith*, with him), for the Chancellor of the University of Oxford. The jurisdiction claimed on behalf of the Chancellor of the University has been constantly acknowledged by the Courts, and by ancient writers. It extends to the suburbs of Oxford and to all other parts of the United Kingdom — "Vel alibi infra nostrum regnum Angliæ." It arises only with respect to resident members of the university, and can be claimed only on behalf of defendants. It extends to

all actions for damages, but not to actions in which the claim is in respect of the thing itself: *Draper* v. *Crowther* (1); *Hayes* v. *Long* (2); *Leasingby* v. *Smith* (3); *Williams* v. *Brickenden* (4); 3 Blackstone's Commentaries, 298. As to the jurisdiction under the Cambridge charter, see *Browne* v. *Renouard.* (5)

As to the time within which a claim to conusance should be made, it is stated in Viner's Abridgment, tit. Conusance of Pleas, (M.) pl. 15, that the claim should be made, "when the matter is local, primo die, viz. when the writ was returned, and, where the matter is transitory, on the day given to plead." In *Parsons* v. *Lord Willoughby de Broke* (6) the Court held that the claim of conusance need not necessarily be made before appearance, and that "primo die" meant on the first reasonable opportunity. It is submitted that in the present case there was no unreasonable delay on the part of the university. Notice that the chancellor intended to claim conusance of the action was given to the plaintiff's solicitor upon the defendant appearing to the writ, and the claim was formally made before the defence was delivered.

A. Charles, Q.C. (*Boxall* with him), for the plaintiff. The jurisdiction claimed on behalf of the Chancellor of the University of Oxford ought to be limited to causes of action arising between members of the university and citizens of Oxford. The language of the charter of Henry VIII. indicates a local jurisdiction. Clause 20 recites that the king "wills to settle and put an end to all and every kind of discords, controversies, and doubts which can for the future arise between the before-mentioned chancellor and scholars of our said university and their successors, and the townsmen (*burgenses*) of the said town." Those words supply the key to the proper limitation to be put upon the charter, and the construction contended for does not exclude jurisdiction over the rest of the kingdom, because it would include a dispute between a citizen of Oxford and a resident there arising in any other part of the kingdom. *Hayes* v. *Long* (7), which has been cited, is the only case in which conusance has been allowed in respect

(1) 2 Ventr. 362.
(2) 2 Wils. 310.
(3) 2 Wils. 406.
(4) 11 East, 543.
(5) 12 East, 12.
(6) 13 W. R. 315.
(7) 2 Wils. 310.

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to a claim made by a person non-resident within the city of Oxford. This question was argued there, but not decided, because Lord Camden's judgment proceeded on the ground that the defendant was not shewn to be resident at Oxford. It is true he said that the charter extended all over England, and that the privilege was confined to defendants, but he gave no reasons to support those propositions. The rules of the Chancellor's Court shew that the jurisdiction is limited as suggested, because rule 23 provides for execution, and the form of the warrant shews that execution can only be within the limits of the university, so that if a stranger recover, all his remedy is against such of the defendant's goods as he can find within those limits. Though the jurisdiction has existed since the time of Henry VIII., this is the first time an application under such circumstances as these has been made. It cannot be that the plaintiff, who has been injured by the publication of a libel all over England, is driven to obtain his remedy in the court of the university, where there are neither proper facilities nor machinery for trying the case or giving effect to the judgment. As to time,—conusance must be demanded after the defendant appears or before the next step in the cause is taken. No agreement between the parties' solicitors will excuse the delay: Vin. Abridg. tit. Conusance of Pleas (M.), pl. 20, 21 (vol. v., 588); *Leasingby* v. *Smith.* (1) In that case Wilmot, C.J., said, after citing authorities, "and many other cases in the books shew that conusance of pleas must be demanded the first day the party liable hath in Court, even upon the return day of the writ if the cause of action appears therein; if it doth not, then upon the first day given in the declaration." Here conusance was only claimed after the statement of claim had been delivered. Upon the authorities the application on behalf of the chancellor to this Court was too late. *Parsons* v. *Lord Willoughby de Broke* (2) was decided on the Cambridge charter, which confines the jurisdiction to the confines of the university. The chancellor must therefore wait for the declaration in order to see whether the cause is within his jurisdiction.

H. Davey, Q.C., in reply. The recital in clause 20 does not apply to the subsequent provisions of the charter which give the

(1) 2 Wils. 406, at p. 413. (2) 13 W. R. 315.

jurisdiction. The residence limitation is imposed, not by the decisions, but by the true construction of the charter, and the limitation of the privilege to defendants follows, because if a privileged person sues he loses the privilege. In *Leasingby* v. *Smith* (1) conusance was not claimed till after imparlance, which all the books say is too late. The passage in Blackstone's Commentaries (vol. iii., p. 298) indicates that the claim is in time if made before the time to plead has expired.

Cur. adv. vult.

Jan. 13, 1886. The judgment of the Court (Lord Coleridge, C.J., and Mathew, J.) was delivered by

LORD COLERIDGE, C.J. In this case a claim was made to this Court on behalf of the Marquis of Salisbury, Chancellor of the University of Oxford, for conusance of the action in the Court of the University. It is an action of libel brought by a person generally resident in London against an undergraduate of Worcester College, Oxford, in respect of a letter published in a newspaper called the *Pall Mall Gazette*, which is published in London, and has a large circulation in England, in Scotland, Wales, and Ireland, in the colonies, and in foreign countries. The claim is based upon charters of Henry VIII. and Queen Elizabeth, confirmed by Act of Parliament in the reign of Elizabeth, and the language not only of the charter but of the Act of Parliament confirming it requires careful examination. There is indeed an earlier charter of Edward IV., in which he confirms a still earlier one of Richard II.; and by these charters the jurisdiction in all personal actions, as well of tort as of contract, to which any member of the university is a party, is transferred to the Chancellor of the University and his successors, their commissaries or vicegerents. [See Registrum Privilegiorum Almæ Universitatis Oxoniensis, p. 40, published in Oxford in 1770.] But, except historically, and for the light it may throw upon the two charters which are confirmed by Act of Parliament, this charter, which is not so confirmed, and could not therefore have in this matter the force of law, need not detain us. It does shew, no doubt, that the tradition of the Crown had been for a very long series of

(1) 2 Wils. 406.

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years to grant, or purport to grant, to the University of Oxford the privilege of withdrawing pleas to which any of its members were a party from the cognizance of the King's Courts to the Courts of the university. But the important and governing charters are those of Henry VIII. and of Queen Elizabeth, confirmed by Act of Parliament in the 13th of Elizabeth in these emphatic words:—"All manner of liberties, franchises, immunities, and privileges, quittances, law days, and other things whatsoever therein expressed be, and by virtue of this present Act shall be, ratified, established, and confirmed unto the chancellor, masters, and scholars of either of the said universities and their successors for ever, any law, statute, usage, custom, construction, or other thing to the contrary in any wise notwithstanding." Now, one of the privileges is that conferred by clause 35 of the charter of Henry VIII., which is at page 73 of the Registrum. [His Lordship read the material parts of clause 35 of the charter as above set out.] This has been translated, as far as we can judge very accurately, in a translation which has been furnished to us, and is as follows:—[His Lordship read the translation.]

That this is a most inconvenient privilege is obvious enough; that if exercised by plaintiffs it would be a most oppressive one is obvious enough also. But the question is, can it be enforced in this case? The question appears to us to be concluded by the fair effect of the few cases which are to be found on the subject. The Courts have taken upon themselves, while allowing the claim of conusance in terms, to place certain, no doubt expedient, but at the same time somewhat arbitrary, limitations upon it. In *Draper* v. *Crowther* (1), Lord Guildford refused to allow the plea in a suit in Chancery for specific performance, saying that the charter must be limited to matters of common law, and to cases where the Courts of the university can give a perfect remedy; though, as to the last reason, it would be practically destructive of the charter altogether, and though the words of the non-intromittant clause, after speaking of the common law judges, go on to say, "seu alii justiciarii vel judices quicumque." Sir W. Blackstone in his Commentaries, vol. 3, p. 298, introduces in like manner words of limitation for which there is no warrant in the words of the charter itself.

(1) 2 Vent. 362.

In *Hayes* v. *Long* (1), Lord Camden and the judges of the Common Pleas limit the charter to the residents in the university, and exclude from its operation members of the university when plaintiffs—a bold stretch of judicial authority in the face of the words of the charter, that the university shall have conusance when any of its members shall be one of the parties—"sit vel erit unus parcium." The case of *Leasingby* v. *Smith* (2) was decided on points of form, the conusance claimed in that case being held by Wilmot, C.J., and the Court of Common Pleas, to be made "neither in due form nor in due time." But in the course of his judgment, Wilmot, C.J., cited with approval the decision of Lord Camden, and adopts the different limitations imposed by his predecessor upon the words of the charter; and this, although he pointedly observes that it had the force of an Act of Parliament. *Williams* v. *Brickenden* (3) was decided also on a point of form, but in that instance in favour of the university. We are now asked, as Lord Camden excluded non-residents and plaintiffs from the operation of this charter, to go further and to exclude defendants also where the plaintiff lives beyond the limits of the university. The Cambridge charter is local in its operation, and is limited by the limits of the university itself, and it does not contain the words on which great reliance was placed by counsel for the university here, "vel alibi infra regnum nostrum Angliæ." We think that to exclude those words from the charter by judicial decision would be in effect to repeal it to that extent, and Lord Camden in the case cited is express upon this point. "The charter," he says, "extends to actions arising in any part of England; but surely it could never intend that scholars, as plaintiffs, should have the privilege of suing in the University in causes of action arising in any part of England, but when they are defendants the privilege extends all over England." We are not insensible to the grave inconveniences which may follow from allowing this claim of conusance; they were well and forcibly urged by the plaintiff's counsel. We may regret, as indeed we do, that the authorities of the university have been advised to insist upon a claim belonging in its character to a state of things which

(1) 2 Wils. 310. (2) 2 Wils. 406.

(3) 11 East, 543.

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has passed away, and of which, so far as the books inform us, there are so few examples. But we did not make the statute of Elizabeth, and we have only to interpret it. We think, upon the true construction of the statute, that this case has been brought within its words. On the lesser question of fact, as to whether the claim was in time, while fully admitting, and indeed insisting upon, the necessity of prompt action by the university if a claim of conusance is to be allowed, we think there was no such laches in this case as to disentitle the university to succeed in this claim, and we are of opinion that the claim of the Chancellor must be allowed. (1)

Motion granted.

Solicitors for the University: *Philpot & Sons, for Morrell & Son, Oxford.*

Solicitors for the plaintiff: *Nye & Greenwood.*

W. A.

April 5.

THE QUEEN *v.* THE LORD MAYOR OF LONDON.

Husband and Wife—Criminal Law—Defamation—Criminal Proceedings by Wife against Husband—Married Women's Property Acts, 1870, 1882, 1884 (33 & 34 *Vict. c.* 93; 45 & 46 *Vict. c.* 75; 47 & 48 *Vict. c.* 14).

A wife could not before and cannot since the Married Women's Property Acts take criminal proceedings against her husband for defamatory libel.

THE case was stated in the judgment of the Court as follows:—

"This was a rule calling upon the Lord Mayor of London and Alfred G. Vance to shew cause why the Lord Mayor should not proceed to hear and determine the matter of an application by Emma Vance, otherwise Stevens, for a summons against the said Alfred G. Vance for a defamatory libel alleged to have been published by him of and concerning the applicant.

"The facts are as follows:—

"On the 25th of November, 1885, Emma Vance laid an information and complaint at the Mansion House before the Lord

(1) Counsel for the university stated that the university authorities, having successfully asserted the privilege claimed, would no doubt attend and give effect to any intimation of opinion from the Court with respect to trying the action in the Chancellor's Court.

Mayor upon an application for a summons against Alfred G. Vance for 'that he the said Alfred G. Vance did maliciously publish of her the said Emma Vance the following defamatory libel in the *Daily Telegraph* of the 14th of November, 1885, viz.: 'Mr. Alfred G. Vance, comedian and vocalist, in answer to an advertisement that appeared in last Tuesday's issue of this paper, informs his friends and the public that the person advertising is in no way related to himself or family,' meaning thereby that she the said Emma Vance was not his wife, and disparaging her in her reputation as a married respectable woman, and tending to bring her into ridicule and contempt as a person who had lived with the said Alfred G. Vance under the pretence that she was his wife, whereas she was his mistress, and in no way related to him.' At the time of the publication of this alleged libel Emma Vance was and still is the wife of Alfred G. Vance.

"Emma Vance tendered herself before the Lord Mayor to prove the publication of the alleged libel, the Lord Mayor refused to grant a summons upon the ground that Emma Vance was the wife of Alfred G. Vance and could not, under the circumstances, prosecute or give evidence against her husband."

March 12. *Wilfred Allen*, (*Poland*, with him), for the Lord Mayor, shewed cause. No doubt in some cases a wife may maintain criminal proceedings against her husband. Her person is protected by the common law, and her property by the Married Women's Property Act, 1882. "Before this Act neither party was allowed to give evidence in any criminal proceedings taken against the other, except (1) where a wife prosecuted her husband for personal violence against herself, or a husband his wife; or (2) apparently in cases of high treason; and (3) under certain special statutes, as the Master and Servants Act, and the recent Explosives Act:" Montague Lush on Husband and Wife, pp. 425, 426. The Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), expressly excepted criminal proceedings from the operation of the Act, and see per Crompton, J., in *Reeve* v. *Wood* (1); Best on Evidence, 7th ed., p. 176. A libel is not personal violence within the exception to the rule which prevents husband and wife

(1) 5 B. & S. 364, at p. 368.

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from taking criminal proceedings against each other. The Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, s. 12, giving to a wife remedies by criminal proceedings for the protection and security of her own separate property, and the Amendment Act, 1884, 47 & 48 Vict. c. 14, s. 1, were only intended for the protection of her property, and do not apply.

Crispe, in support of the rule. This libel is injurious to the separate property of the wife. Reputation is property. The Court can restrain the publication of documents injuring professional reputation: *Dixon* v. *Holden*. (1)

[MATHEW, J. That case has been overruled in the Court of Appeal: *Prudential Assurance Co.* v. *Knott*. (2)]

In criminal proceedings the Crown is the real prosecutor. In *Phillips* v. *Barnet* (3), Blackburn, J., says: "In the case of an ordinary assault it is quite clear that a wife has a right for her protection to obtain articles of the peace against her husband, and upon this and upon other occasions she is in law a separate person."

[A. L. SMITH, J. Can you produce any case in which any other exception than that of personal injury to the wife has been made from the rule that she cannot prosecute her husband?]

No.

Montague Lush, amicus Curiæ, referred to observations of Brett, M.R., in *Summers* v. *City Bank*. (4)

Cur. adv. vult.

April 5. The judgment of the Court (Mathew and A. L. Smith, JJ.) was delivered by

A. L. SMITH, J. (who after stating the rule and facts as above set out, proceeded :—) It cannot be doubted that by the law of England before the passing of the Married Women's Property Acts, 1870, 1882, and 1884, 33 & 34 Vict. c. 93, 45 & 46 Vict. c. 75, and 47 & 48 Vict. c. 14, except in the cases hereinafter mentioned a husband or wife could not take criminal proceedings against each other.

From the earliest time it has been held that a feme covert was

(1) Law Rep. 7 Eq. 488.
(2) Law Rep. 10 Ch. 142.
(3) 1 Q. B. D. 436, at p. 438.
(4) Law Rep. 9 C. P. 580.

not guilty of felony in stealing her husband's goods, the reason being that husband and wife were considered but as one person in law: see 1 Hale, P. C. p. 514. Upon the same principle it was held that a husband could not grant lands to a wife, for the maxim of the law was "That a husband and wife are one person": *Firebrass* d. *Symes* v. *Pennant* (1), and per Lush, J., and Field, J., in the case of *Phillips* v. *Barnet*. (2) It was also the law of England before the passing of the Married Women's Property Acts that a husband and wife in a criminal case, except as hereinafter mentioned, and in cases of high treason, could not give evidence for or against each other, and until the passing of 16 & 17 Vict. c. 83, could not have given evidence for or against each other even in a civil suit. There were, however, exceptions recognised by the law to the above rule. The question for determination is, whether the present case, which is that of a wife seeking to prosecute her husband for a defamatory libel, comes within the exception or not.

We are of opinion that the exceptions are confined to those cases in which personal injuries have been effected by violence or coercion by the husband upon the wife or wife upon the husband: see Phillips on Evidence, 10th ed. p. 83. It is upon this ground that it has been held that a husband and wife, as the case may be, can prosecute and give evidence against each other in cases of batteries, assaults, and other personal injury.

This, as it appears to us, is the law as laid down in *Reeve* v. *Wood*. (3) Upon this principle it is that the two cases of abduction, *Reg.* v. *Yore* (4), and *Reg.* v. *Wakefield* (5), would seem to have been decided; for, as pointed out by Crompton, J., in *Reeve* v. *Wood* (3), there might well have been considered to have been what was equivalent to an actual personal injury to the woman herself in those cases.

The following passage in the judgment of Mr. Justice Blackburn in the case of *Phillips* v. *Barnet* (6) is very apposite to the matter in hand.

That learned judge there says: "There can be no doubt that

(1) 2 Wils. 254.
(2) 1 Q. B. D. 440, 441.
(3) 5 B. & S. 364.
(4) 1 Jebb & Symes, 563.
(5) 2 Lew. C. C. 279.
(6) 1 Q. B. D. 438.

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if a wife receives bodily injury from the hands of her husband he is liable to criminal proceedings for a felony or a misdemeanor, as the case may be; and in the case of any ordinary assault it is quite clear that the wife has a right for her protection to obtain articles of the peace against her husband."

In our judgment the exception only extends to the class of case where bodily injury has been received by the wife or husband as the case may be.

No case has been cited at the Bar, nor are we aware of any, in which the exception has ever been extended beyond that above enunciated, and it is worthy of remark that if the law be as was contended by the applicant no trace of authority to support her position can be adduced in her behalf.

It was then argued, however, that even if the present case does not come within the exception as the law stood before the passing of the Married Women's Property Act, 1870, yet it comes within the existing Act of 1882, and that by virtue of the provisions of that Act she was now enabled to prosecute her husband for a libel upon her reputation and credit.

It was said that by s. 12 of the Act of 1882 it was enacted that every woman, whether married before or after the passing of the Act should have against her husband the same remedies and redress by way of criminal proceedings, "for the protection and security of her own separate property, as if such property belonged to her as a feme sole," and that the present criminal proceeding against her husband for libel was for the protection and security of her separate property she being a vocalist.

It was argued before us that it having been stated by Brett, J., during the argument in the case of *Summers* v. *City Bank* (1), under s. 11 of the Act of 1870, that a wife could sue her husband for a libel upon her in her trade, that therefore it necessarily followed that she could criminally prosecute him in a case like the present.

It seems to us that the argument is wholly fallacious. First, we would point out that under s. 12 of the Act of 1882 which is the Act now in force (it was equally so under s. 11 of the Act of 1870) proceedings, whether civil or criminal, can only be taken by wife

(1) Law Rep. 9 C. P. 580.

against husband for the protection and security of her own separate estate.

How can criminal proceedings for a personal libel be said to be for the protection and security of her own separate property?

Libel on an individual is, and has always been, regarded as both a civil injury and a criminal offence. The person libelled may pursue his remedy for damages or prefer an indictment; he may both sue for damages and indict. It is ranked amongst criminal offences because of its supposed tendency to arouse angry passions, provoke revenge, and thus endanger the public peace: see per Lush, J., *Reg.* v. *Holbrook.* (1) How can a prosecution for a libel which is criminal only because of the tendency above pointed out, be said to be for the protection and security of the separate estate. It seems to us impossible to so hold, even if it may hereafter be held (upon which we give no opinion) that an action for libel in a case like the present can be maintained by a wife against a husband. It seems to us, moreover, looking at the complaint made, that it would be impossible to hold the separate estate as contemplated by the statute was ever here in jeopardy.

What was damaged, if anything, was the fair fame of the applicant, and that, in our judgment, is not separate estate.

We are of opinion, for the reasons above stated, that neither as the law stood prior to 1870, nor since, can a wife criminally prosecute a husband or give evidence against him upon a prosecution for a personal libel upon herself.

We, therefore, discharge this rule with costs.

Solicitor for applicant: *Heritage.*

Solicitor for respondent: *The City Solicitor.*

(1) 4 Q. B. D. 46.

J. R.

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March 3, 5.

[IN THE COURT OF APPEAL.]

NOTTINGHAM PATENT BRICK AND TILE CO. *v.* BUTLER.

Vendor and Purchaser—Specific Performance—Rescission of Contract—Return of Deposit—Misleading Conditions of Sale—Restrictive Covenants—Sale of Estate in Lots—Purchaser for Value without Notice—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3.

The owner in fee of land sold and conveyed it, during the years 1865, 1866 and 1867, in thirteen lots to different purchasers, each lot being subject to covenants entered into by the purchasers, restricting the use of the land as a brickyard, and in other respects. The defendant subsequently became the purchaser of Lot 11, but the deed of conveyance to him did not contain the restrictive covenants. In 1882 the plaintiffs, a company for manufacturing bricks, contracted to purchase Lot 11 from the defendant under conditions of sale which stated that the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not; and provided that any error or omission in the particulars should not annul the sale, nor entitle the purchaser to compensation.

The existence of the restrictive covenants was not mentioned in the contract, but during the negotiations the defendant stated that there were covenants restricting the use of the land as a brickyard, but his solicitor, who was present, and to whom the plaintiffs' solicitor applied for information, stated that he was not aware of any such covenants. The plaintiffs paid a deposit upon the purchase-money, and having subsequently discovered that there were restrictive covenants, claimed to rescind their contract and sued the defendant to recover the amount of the deposit:—

Held, affirming the decision of Wills, J., that the plaintiffs, if their contract with the defendant were carried out, would be bound by the restrictive covenants, and that the owners of the other twelve lots purchased from the original vendor would be entitled to enforce those covenants against the plaintiffs; that the plaintiffs were not precluded by the terms of the conditions of sale, nor by s. 3, sub-s. 3, of the Conveyancing Act, 1881, from refusing to complete the purchase, and that they were therefore entitled to recover the amount of the deposit.

APPEAL of the defendant from the judgment of Wills, J., at the trial of the action in favour of the plaintiffs. (1)

The action was brought to recover the sum of 610*l.*, which the plaintiffs had paid to the defendant as a deposit upon the purchase by the plaintiffs from the defendant of a plot of land containing about six and a half acres. The plot of land was put up by the plaintiffs for sale by auction on the 26th of September,

(1) 15 Q. B. D. 261.

1882, subject to certain conditions of sale, but was not then sold. Among the conditions were the following:—

"4. The property is sold subject to all tenancies, tenant rights, chief and other rents, tithe, rights of way, water, light, and other easements, and also to an arrangement entered into with the Nottingham Waterworks Co. for removing from time to time and laying down along the private road, called Plains Road, new main water-pipes, and also to the payment of a rateable proportion of the expense of keeping the said private road and gate at the end thereof next Mapperley Plains in good condition, and also subject to any matter or thing affecting the same, whether disclosed at the time of sale or not."

"10. The title shall commence with an indenture of conveyance dated the 20th of May, 1868, and made between Conway Barnett of the first part, Harriett Maltby, spinster, of the second part, and Wm. Windley of the third part."

"12. The property is believed to be, and is to be taken to be, correctly described, and any incorrect statement, error, or omission found in the particulars or these special conditions, is not to annul the sale, nor entitle the purchaser to be discharged from his purchase, nor is the vendor or purchaser to claim to be allowed any compensation in respect thereof."

Neither the particulars nor the conditions of sale contained any intimation that the land was subject to any covenants or conditions restricting the mode of its user by the owner. Shortly after the abortive auction, the plaintiffs, by their solicitor, Mr. Hind, entered into negotiations, first with the auctioneer, and then with the defendant himself, for the purchase of the plot of land, in the course of which the defendant told Mr. Hind that the land was subject to some restrictive covenants which would prevent its being used as a brickfield. The defendant's solicitor, Mr. Gilbert, who was present, was asked by Mr. Hind whether this statement of the defendant was correct, and he replied that he was not aware of any restrictions. Thereupon the defendant said that he had seen the restrictions in one of the old title deeds, and, upon Mr. Hind again appealing to Mr. Gilbert, the latter repeated that he was not aware of any restrictions. Mr. Gilbert, however, did not say that (as the fact was) he had not read the

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earlier title deeds, and knew nothing about their contents. Thereupon one of the directors of the plaintiff company, who was present, signed, on behalf of the company, a contract to purchase the plot of land in question for 6100*l.*, and a deposit of 610*l.* was paid to the defendant. The contract was made subject to the above-mentioned conditions of sale.

In December, 1882, the plaintiffs discovered for the first time that the land had formed part of an estate of about forty-three acres, which was on the 24th of March, 1865, put up by the then owners in fee for sale by auction in thirteen lots, the plot which the present plaintiffs had agreed to purchase from the defendant having been lot 11 at that sale. That sale was made subject to (inter alia) the following conditions:—

"15. All buildings to be erected on any part of the said lands shall be stone-coloured, with slated roofs; and no building to be occupied as a public-house or workshop, or blacksmith's shop, or as a butcher's shop or slaughter-house, or chandler's house or shop, or as a shop for the sale of any article whatsoever, or for the purpose of using, working, or making any article of manufacture therein, shall be erected, or built, or so used upon any part of the land now offered for sale; nor shall any part thereof be used as a brickyard, or for the making of bricks, except Lot 13; and, in case the property shall be sold in lots, no house shall be erected on any part of the said land, except on Lot 13, at a less cost than 400*l.*"

"16. The purchaser of the property, or of each lot, in case the same shall be sold in lots, shall enter into all such covenants with the vendors as the vendors' counsel shall deem necessary or proper for securing the performance of these conditions on the part of such purchaser, which covenants shall be inserted in his deed of conveyance; and he shall also, in conjunction with the other purchasers (if any), enter into and execute a separate deed containing like covenants with the vendors, such separate deed being prepared at the expense of the vendors, but perused on behalf of such purchaser or purchasers respectively, and executed at his or their expense."

At this sale only Lots 1, 2, and 12, were sold. In February, 1866, there was a second auction, at which Lots 6, 7, and 8 were

sold. In October, 1867, there was a third auction, at which Lots 9 and 10 were sold. Lots 3, 4, and 5 were sold respectively in 1865, 1866, and 1867, by private contract to different purchasers. Lot 11 was also sold by private contract, and was conveyed to Barnett, the purchaser, by a deed dated the 4th of September, 1866, which deed contained a restrictive covenant by the purchaser with the vendors in accordance with the above conditions of sale. Lot 13, which was then a brickfield, was sold in June, 1866, by private contract, and the conveyance of it to the purchaser contained, with the exception of a permission to build a blacksmith's shop, a covenant embodying such of the restrictions as were applicable to that lot. On the evidence, the Court was satisfied that all the lots were sold subject to the original conditions of sale, and that each of the purchasers entered into restrictive covenants with the vendors in accordance with those conditions, the covenants being modified in the case of Lot 13 as above stated.

The defendant purchased Lot 11 in 1877 from William Windley. The conveyance to Windley contained no reference to the restrictive covenants. The defendant alleged (though this defence was not much insisted on before Wills, J., at the trial), that he bought the property without any notice of the restrictive covenants, and that he discovered their existence afterwards on looking at the conveyance to Barnett.

The plaintiffs, on discovering the restrictive covenants, brought this action, claiming the return of their deposit. The defendant delivered a counter-claim for the specific performance of the agreement to purchase.

Wills, J., gave judgment for the plaintiffs on the claim and the counter-claim. The defendant appealed.

A. Charles, Q.C., and *W. Graham*, for the defendant. First, the evidence shews that the defendant was a bonâ fide purchaser of the property for value without any notice of the restriction, and consequently he is not bound by those covenants himself, and can convey a good title to the property, free from those covenants, to any purchaser, whether he has notice of them or not.

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Secondly, the restrictive covenants were entered into only with the original vendors. There was nothing to bind the purchasers of the lots inter se by the covenants, and there is no one who could enforce them against the plaintiffs. In order that the purchaser of one of a number of lots should be entitled to the benefit of a covenant entered into by his fellow purchasers, there must either be mutual covenants, or there must be an express contract by the vendor with the purchasers that each purchaser shall have the benefit of the covenants entered into by the other purchasers with the vendor. The deed which contains the covenant ought to define the property for the benefit of which the covenant is entered into: *Renals* v. *Cowlishaw*. (1)

If the judgment is right, the original vendors, if they had sold only one lot at the first sale, could never afterwards have dealt with the residue of the estate, except subject to the restrictive covenants. There is in the conveyance to Barnett no mention of the property having been one of a number of lots put up for sale together; it was a mere ordinary private conveyance. The deed ought to shew that there was a common scheme, like a building scheme, relating to all the lots: *Keates* v. *Lyon*. (2) The question is one of contract, not, as Wills, J., said, one of intention. If the owner of an estate puts it up for sale in lots, subject to restrictions, intending to sell it all if he can find purchasers, and he only succeeds in selling one lot, the purchaser of which lot enters into restrictive covenants, the vendor is not prevented from afterwards dealing with the unsold portion of the estate in any way he pleases: *Master* v. *Hansard*. (3)

Thirdly, the plaintiffs cannot object to the restrictive covenants, for they had notice of them before they entered into the contract with the defendant. The defendant told them that the land could not be used as a brickfield. This was sufficient, at any rate, to put them on inquiry. They were not really put off inquiry by what Gilbert said. Wills, J., held that the effect of what took place was to leave the matter as if there had been no conversation at all.

Fourthly, there being no fraud, the plaintiffs are prevented by

(1) 9 Ch. D. 125; 11 Ch. D. 866, 868.

(2) Law Rep. 4 Ch. 218.

(3) 4 Ch. D. 718.

the 4th and 12th conditions of sale from raising the objection: *Smith* v. *Robinson* (1); and the conveyance to Barnett ought not to have been received in evidence, because, by condition 10, it was stipulated that the title was to commence with the conveyance to Windley in 1868. The plaintiffs were not entitled to call for any earlier deed: s. 3 (3) of the Conveyancing Act, 1881. (2)

Cookson, Q.C., *Darling, Q.C.*, and *R. M. Bray*, for the plaintiffs, were not heard.

LORD ESHER, M.R. I am of opinion that the decision of Wills, J., must be affirmed.

One fact in the case was not clearly brought before Wills, J., but, assuming the facts to be as he considered that they were, I think his judgment was right in every particular. The first point he had to consider was, whether there were with regard to this property restrictive covenants which could be enforced by any one of the purchasers of other parts of the estate of which this property had formed part against any other. It has been argued that there are no restrictive covenants capable of being

(1) 13 Ch. D. 148.

(2) Sect. 3 of the Conveyancing Act, 1881, provides by sub-s. 3: "A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser, nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise."

And by sub-s. (11): "Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court."

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enforced in that way, because there was no covenant, either in writing or otherwise in express terms, that each covenantor —each original purchaser—would consider himself bound to the other purchasers, and there was no covenant by the original vendor. But I think that Wills, J.'s, view of the law on this subject is perfectly correct. In my view he is right in saying that, when an estate is put up for sale in lots, subject to a condition that restrictive covenants are to be entered into by each of the purchasers with the vendor, and the vendor is intending at that sale to sell the whole of the property, the question, whether it is intended that each of the purchasers shall be liable in respect of those restrictive covenants to each of the other purchasers, is a question of fact, to be determined by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as every other question of intention. And, if it is found that it was the intention that the purchasers should be bound by the covenants inter se, a Court of Equity will, in favour of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so under such circumstances without introducing the vendor into the matter.

Now in the present case the property was originally put up for sale in lots, and it seems to me that the evidence is conclusive that the vendor, at the time when he first put it up to be sold by auction in lots, intended to sell the whole property, and that his intention to sell the whole was clearly published, so that everyone who was present at that auction must have known that he was intending to sell the whole, and, as the purchasers were to enter into restrictive covenants, it follows that the purchasers must have known that those covenants were really intended for the benefit of each of them as against all the rest. But it is said that the whole of the property was not sold at once; some parts of it were sold at the first auction, and other parts were not sold till afterwards. That is true, and it is also true that the subsequent sales were at considerable distances of time after the first. That would be a circumstance to be taken into account in considering what was the view of the later purchasers, if that was material. But it is impossible, in my opinion, to say that the mere fact

that the lots were not all sold on one day can make any difference. Lapse of time is not of itself a bar to the liability of the purchasers inter se; it is a matter to be taken into consideration, but it is not a bar. In the present case I think the evidence is conclusive that the sale of every one of the lots was made under the original conditions, and under the authority which was given on the first occasion, when the vendor put up the whole of the lots for sale. The lots were not all sold on the first occasion only because there were not bidders for them all, but no new instructions were given to the auctioneer for the subsequent sales, no new bargain was made with him, no charges were made by him for altering any of the conditions.

There are two lines of cases to be found in the books. The first is where there has been a sale of part of a property, with no then existing intention of selling the rest, and subsequently there is a sale of another part; then, as regards the later sale, you cannot look at the conditions of the former sale, you must look only at the conditions relating to the later sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots, subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others.

Then it is said that there is no one who could enforce these covenants. But, if all these sales were parts of the one original sale, and the covenants were entered into by each purchaser for the benefit of the other purchasers, each of them could insist on the performance of the covenants by the others.

Wills, J., thought that there was no evidence that the defendant did not buy his lot with notice of the restrictive covenants, and, if that were true, the property came down to him still bound by those covenants in favour of the other purchasers. It was

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argued that, even though the restrictive covenants would have been binding on Butler, yet they would not bind the plaintiffs, because they had no notice of them before they entered into their contract. I cannot follow that argument, and I think the learned judge was right as to that. It was said that Butler at all events made no statement to the plaintiffs with regard to the absence of restrictions, but, when you look at the conversation between Butler and his solicitor and the plaintiffs or their agent, it seems to me that Wills, J., has treated that matter very mildly indeed. But, supposing he was right in the view which he took of that, and that the case stands in the same position as if no statement had been made, then it is said that by reason of the conditions of sale and of the provisions of the Conveyancing Act, although there is a defect in the title, yet it can be forced upon the purchasers. It seems to me an astounding proposition that a vendor can by means of such conditions of sale force upon a purchaser a defective title, even though he (the vendor) knew of the defect. Now, that Butler did know of the defect seems to have been assumed by Wills, J.; if you treat him as dealing himself with the purchasers he knew of the defect, and, if the conversation between his solicitor and the plaintiffs' solicitor, at which he was present, amounted to nothing at all, then it comes to this, that he, knowing the defect, by his agent put forth the condition of sale. If that is so, the case is absolutely within the authority of *Haywood* v. *Mallalieu* (1) as it seems to me. It is impossible for a vendor, knowing of a defect in his title, either by himself or his agent to put forward conditions of sale which are to force upon a purchaser a bad title of which he knew, but which he did not disclose. A Court of Equity would not be of much use if it could not meet such a case as that, and it seems to me clear that a Court of Equity would never have enforced a contract under such circumstances. Does the Conveyancing Act make any difference? I entirely agree that, whatever construction you put upon it, it cannot have that effect. It cannot cure that defect in the title of the defendant. If that is true there was a defect in the defendant's title, and he was insisting that the Court should force on the purchasers from him a bad title. The Court

(1) 25 Ch. D. 357.

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will not do that. He cannot have specific performance of the contract when he has a bad title which was within his knowledge, and it seems to me that he cannot keep the deposit. Therefore, Wills, J., was right from this point of view.

But the case comes before us on another point of view. It is said, and I will now assume that the fact is so, that Butler was a purchaser for value without notice of the restrictions, and then it is said that, if the plaintiffs took a conveyance from him, they would not be subject to the restrictions. As at present advised I think that would be so, and that, when once there has been a purchaser for value without notice of the restrictions, the restrictions are gone, and a good title can afterwards be made free from them. But the title would then depend upon the question whether the previous purchaser did buy without notice; that must always be a question of fact and a matter of evidence, and a title depending upon evidence of matters of fact is a title which is capable of being disputed in a Court of Law, and, although the plaintiffs would in point of law, if the alleged fact was true, get the property free from the restrictions, yet in all probability, or almost certainty, they would be buying a lawsuit in order to get their title clear. Under such circumstances, where the rectitude of the title depends upon facts which very probably will be disputed, and are certainly capable of being disputed, a Court of Equity will not, as I understand, enforce the contract. Therefore, in that view also, the defendant would not be entitled to specific performance of the contract. But still, if there were nothing else in the case, I think he could not have been compelled to give back the deposit.

This obliges us to enter into the disagreeable question whether Wills, J., in his comments upon what took place at the interview at which the contract was signed, has not been too lenient. The evidence has been read to us, and I am sorry to say that I have come to the conclusion that the defendant's solicitor allowed himself to be carried away by his zeal for his client, and that he did not act with that candour to the other side with which a solicitor is bound to act under such circumstances. He allowed himself, in his zeal for his client, to make statements which were calculated to lead the other side to believe that he was stating

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Lord Esher, M.R.

facts within his own knowledge, and his statements in fact misled them, so that what he said amounts to a mis-statement of facts. If that is so, and what he said was said in the presence of the defendant, it seems to me that Wills, J., was too lenient in saying that he was not acting as the agent of the defendant. The solicitor was entrusted with the sale, and his client stood by him and made a statement to the purchaser, but the solicitor, the person upon whom the purchaser would naturally rely (as the defendant, if he had thought for a moment, must have known) as to such a matter more than on the client, immediately contradicted his client, and said that which to my mind was equivalent to saying, "My client, who says he has read the deeds, does not understand them; he is mistaken, and I tell you there is no such restriction." That was the natural interpretation of what he said, and to my mind it is clear that the plaintiffs, in entering into the contract and paying the deposit, relied upon that statement of his which, under the circumstances, was equivalent to a mis-statement. That being so, I think the defendant cannot keep the deposit. So that, in this point of view also, the decision of the learned judge is right, and the appeal must be dismissed.

I should have said that of course upon this mis-statement all other questions fall to the ground. The moment we find there was this mis-statement, it is obvious that the contract could not be enforced against the plaintiffs.

LINDLEY, L.J. I am of the same opinion, and I may state my view of the case very shortly.

The most favourable way of looking at it from the vendor's point of view is to assume that he was himself a bonâ fide purchaser for value without notice of the restrictive covenants. How does the case stand upon that assumption? I take it to be perfectly well settled that, as stated in Lord St. Leonards' book on Vendors and Purchasers (14th ed. p. 753), "a person with notice of an equitable claim may safely purchase of a person who bought bonâ fide, and without notice of it." Therefore Butler, being himself a bonâ fide purchaser for value without notice, had a good title, and could convey that title to anyone else, even if that person had notice of the restrictive covenants. But still,

assuming that in the defendant's favour, it is equally plain, apart from all other considerations, that he could not obtain specific performance of the agreement. In the same book it is laid down (p. 753) that "a purchaser would not be compelled to accept a title depending upon proof of the seller not having had notice of an incumbrance." The good sense of that is plain. Upon the evidence as it now stands it seems to me that Butler bought without notice of the covenants. But, suppose a litigation ensued between some other persons and the present plaintiffs, after the property had been conveyed to them, we cannot tell what evidence might be forthcoming, and it is quite possible that, upon a reinvestigation of the facts, it might appear that Butler had notice of the covenants. It is to prevent purchasers from being embarrassed by any such chance of litigation that the Court of Chancery has never compelled a purchaser to take a title, which might be a good holding title, but which might possibly, and very probably, lead to an immediate litigation with some other person. Therefore, assuming that Butler was a bonâ fide purchaser for value without notice, he could not enforce specific performance of this contract against the plaintiffs.

Are then the conditions under which he sold so worded as to enable him to enforce such a contract? Assuming that he was a bonâ fide purchaser for value without notice, but that, at the time of the sale to the plaintiffs, he was aware of the restrictions, if he intended to cover that blot on his title, and to say to a purchaser, You must take such title as I have got; I am a bonâ fide purchaser for value without notice of any restrictions; you must buy upon that condition;—he ought to have used a condition pointing to the blot much more specifically than the actual conditions have done, and it would not be right to enforce specific performance of the contract without the attention of the purchasers having been much more closely drawn to the blot. Therefore, the counter-claim of the defendant for specific performance cannot succeed.

Then comes the question, whether the purchasers are entitled to rescind the contract and to have back their deposit. If there was nothing beyond that to which I have already alluded, I should have thought that they could not have got back their deposit.

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The case would have stood thus, that, if they had chosen, they could have completed, taking the title, which, in the circumstances which I have assumed, would be a good holding title, and, if they did not choose to do that, I do not think they would have been entitled to get back the deposit. But the case does not rest there. Their right to recover the deposit appears to me to turn entirely upon what took place at the interview which preceded the contract. As to that Mr. Gilbert, jun., on cross-examination, said, "I knew they" (that is the plaintiffs) "were a company for brick-making. I had no doubt they wanted the land for brick-making purposes. I intended to convey to Hind (the plaintiffs' solicitor) that I did not know of any restrictions, and did not believe that there were any. We had the old deeds in our possession at the time of the sale. I did not tell him that I had not read those deeds." Upon the evidence it seems to me that the inference is unavoidable that the plaintiffs bought upon the faith of there being no restrictions, and upon the faith of the defendant's solicitor knowing that there were none, and after those statements were made by him to induce that belief. In that case (although I do not accuse Mr. Gilbert of anything like fraud) there is such a misrepresentation tainting the whole of the contract as entitles the purchasers to rescind it, and to have back their deposit.

LOPES, L.J. I am of the same opinion. I entirely agree with Wills, J., as to everything he said with regard to the facts with which he was dealing. But a point—not perhaps a new point—but one which was dealt with in a very subordinate way before him, has been relied on before us. It is now said that the defendant was a bonâ fide purchaser for value without any notice of the restrictive covenants, and that, therefore, he was not bound by them, and is competent to transfer the property to the plaintiffs free from those restrictions. I will assume that to be so. But the question whether he did or did not buy without notice of the restrictive covenants is a matter of evidence, a matter which might have to be proved, and which might be more or less doubtful. The plaintiffs contracted to buy the property free from incumbrances and without any restrictive covenants; they did not agree to buy it with a lawsuit. Under these circumstances I

think that the defendant cannot compel specific performance of the contract.

That would relieve the plaintiffs from the performance of this contract, but it would not entitle them to the return of their deposit. It becomes, therefore, necessary to consider what happened just before the contract was entered into with regard to these restrictive covenants. It seems to me perfectly clear upon the evidence that Butler knew of them, and it seems equally clear that Gilbert's conduct cannot be approved of. He clearly (it may have been through over zeal for his client) endeavoured to suppress and to conceal them, and I believe that the plaintiffs signed the contract relying upon what had been said by him with regard to those covenants.

If that is so, the plaintiffs are clearly entitled, not only to be relieved from the contract into which they have entered, but also to a return of their deposit.

LINDLEY, L.J. I wish to add that I think the way in which Mr. Justice Wills has treated *Keates* v. *Lyon* (1) and that class of cases is correct, and that it is an inference of fact in each case whether the purchasers are bound inter se by such covenants, and that the mere fact that the vendor does not bind himself expressly to enforce the covenants which he takes for the benefit of the purchasers is not material. That was in effect decided by Bacon, V.C., in *Harrison* v. *Good.* (2)

Appeal dismissed.

Solicitors for plaintiffs: *Aldridge, Thorn, & Morris, for Wells & Hind, Nottingham.*

Solicitors for defendants: *Torr & Co., for Toule, Gilbert & Sons, Nottingham.*

(1) Law Rep. 4 Ch. 218. (2) Law Rep. 11 Eq. 338.

W. L. C.

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March 25.

POLLEXFEN & CO. *v.* SIBSON & CO.

Practice—Writ of Summons—Service—Defendants sued in the Name of Partnership Firm—Foreign Partnership—Service on one Member of Foreign Firm within Jurisdiction—Rules of the Supreme Court, 1883, *Order IX., r.* 6—*Appendix A., Part* 1, *Forms* 5–8.

The defendants, who were a foreign partnership carrying on business out of the jurisdiction, were sued in the name of their firm. One member of the firm happening to be within the jurisdiction was served with the writ, which was the ordinary eight day writ :—

Held, that such service was good under Order IX., r. 6, which provides that, where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there.

Appeal from the order of Wills, J., at chambers, setting aside the service of the writ of summons.

The facts were as follows:—

The defendants, who were an American partnership carrying on business in the United States, were sued in the name of their firm for breach of contract. One member of the firm happening to be in England on business was served with the writ, which was the ordinary eight day writ. The learned judge set aside the service as irregular.

Gorell Barnes, for the plaintiffs. The service of this writ was effected in the manner authorized by Order IX., r. 6. There is nothing in the terms of that rule to confine its application to English partnerships.

J. Edge, for the defendants. Order II., rr. 3 and 5, provides that the writ of summons shall, except in the cases in which any different form is provided, be in one of the Forms Nos. 1 to 4 in Appendix A., Part 1, but that a writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be in one of the Forms 5 to 8 in Appendix A., Part 1. The note to the Forms 5 to 8 says, "This writ is to be used where the defendant, or all the defendants, or one or more defendant or defendants is or are out of the jurisdiction." It

follows that where one or more members of a firm made defendants is or are out of the jurisdiction, one of those forms 5 to 8 is to be used. It would be productive of the greatest inconvenience if an ordinary eight day writ issued against a foreign firm could be served on one of the firm who might casually be within the jurisdiction. Order XII., r. 15, provides that, where persons are sued as partners in the name of their firm, they shall appear individually in their own names. It might be wholly unreasonable or impossible where the other members of the firm are at a great distance that they should appear within eight days. The forms of writ for service out of the jurisdiction require appearance to be entered within a period to be fixed by the court or a judge. The other partners being out of the jurisdiction, the plaintiffs could no doubt have sued and served the one member of the firm who was within the jurisdiction in the ordinary way, but it is submitted that they cannot sue the firm and serve the members of the firm who are out of the jurisdiction by serving the partner who is within the jurisdiction, because it is expressly provided that, where a defendant to be served is out of the jurisdiction, the form of writ for service out of the jurisdiction must be used.

MATHEW, J. I think that this appeal must be allowed, and the order of the judge at chambers rescinded.

The defendants are a firm which carries on business abroad; and the writ was, according to the modern practice, issued against them in the name of the firm. One member of the firm happening to be in this country, the writ was served upon him. It was argued that it might be so served under Order IX., r. 6, which provides that "where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there, and, subject to these rules, such service shall be deemed good service on the firm." The question is whether that rule applies to a foreign firm as well as an English partnership. In the case of the latter it is clear it would apply, and service on one of the firm within the jurisdiction would be good, though

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other members of the firm might be out of the jurisdiction at the time. Why should the rule not apply to the case of a foreign firm? It could not be denied that, if instead of the writ being issued against the firm the names of all the partners had been inserted in the writ, and such writ had been served on one of the partners within the jurisdiction, the service would be good and the action could proceed against that one. It seems to me that the service is good as being in accordance with Order IX., r. 6, which in terms applies to all partnerships. What the subsequent effect with regard to judgment and execution against the other partners may be, it does not seem to me necessary at present to consider, the question before us being merely whether or not the service ought to be set aside. It was said on behalf of the defendants that the note to the Forms 5 to 8 in Part 1 of Appendix A. to the rules of 1883, shewed that the service of the writ was bad in this case. That note says, "This writ is to be used where the defendant, or all the defendants, or one or more defendant or defendants, is or are out of the jurisdiction." But it appears to me that this note contemplates the case where, a defendant or defendants being out of the jurisdiction, a writ is to be served on such defendant or defendants out of the jurisdiction, in which case, of course, the form must be followed. It is not a direction that, wherever one or more of the defendants is out of the jurisdiction, this form of writ must be used. In the present case, there was no reason for the application of that form of writ, because the writ could be served on a person within the jurisdiction.

SMITH, J. I agree. I think that but for the note to Forms 5 to 8 in Appendix A, Part 1, this case would have been unarguable. The terms of Order IX., r. 6, are perfectly general and unrestricted, and appear to provide that, wherever a partnership is sued in the name of the firm, service on one of the partners shall be good, though, of course, the fact that the others have not been served may make a difference afterwards when the question against whom execution can be obtained arises under Order XLII., r. 10. It seems to me that Order IX., r. 6, must apply to foreign as well as English firms. It was said that it could not do so

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because of the words of the note to the Forms 5 to 8 in Appendix A, Part 1. But, if the plaintiff can find a member of a foreign firm here, it appears to me that the plaintiff can serve him under Order IX., r. 6, and then he has no need to have recourse to the forms of writ to which the note is appended. The meaning of the note, in my opinion, is that that form of writ is to be used where it is desired to serve the writ on a defendant out of the jurisdiction, and it has no application where the plaintiff serves his writ on one of the partners within the jurisdiction.

I think that the service was good, and that the order of the judge at chambers should be set aside.

Order rescinded.

Solicitors for plaintiffs: *J. & R. Gole.*
Solicitors for defendants: *Stibbard, Gibson, & Co.*

E. L.

END OF VOL. XVI.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1886, will be as follows:—

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is, by reason of fraud or otherwise, no real debt, the Court ought not to make a receiving order without first inquiring into the truth of the debtor's allegations.—*Ex parte Kibble* (Law Rep. 10 Ch. 373) discussed and followed.—An order made by consent at the trial of an action on a promissory note, that the statement of defence and the pleadings be withdrawn, and that the defendant do pay to the plaintiff a specified sum and taxed costs:—*Held*, not to be a "judge's order made by consent" within s. 27 of the Debtors Act, 1869. EX PARTE LENNOX. IN RE LENNOX [C. A. 315

2. —— *Books of Account—Bankruptcy Rules*, 1883, *r.* 259—*Practice.*] The 259th rule of the Bankruptcy Rules, 1883, which provides that "no person shall as against the official receiver or trustee be entitled to withhold possession of the books of accounts belonging to the debtor, or to set up any lien thereon," is to be construed strictly, and will not be extended to vouchers, counterfoils of cheques, books, correspondence, and other papers in the hands of another person, although such documents would be of material assistance to the trustee in preparing his accounts of the bankrupt's estate. IN RE WINSLOW. EX PARTE GODFREY - - - - - 696

3. —— *Charging Order Nisi under* 1 & 2 *Vict. c.* 110, *s.* 14—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45.] An order nisi charging shares under 1 & 2 Vict. c. 110, s. 14, is not "an execution against the goods of a debtor" within s. 45 of 46 & 47 Vict. c. 52 (the Bankruptcy Act, 1883). IN RE HUTCHINSON. EX PARTE HUTCHINSON 515

4. —— *Composition — Secured Creditor—Deposit of Goods—Bill given for Debt indorsed away —Composition paid to Indorsee without deducting Value of Security.*] The plaintiff gave credit to the defendants for goods sold and made advances to them; goods were deposited by the defendants with the plaintiff as security, and bills were drawn by the plaintiff and accepted by the defendants for the amounts of the goods sold and advances made.—The plaintiff indorsed away such bills for value. During the currency thereof the defendants filed a petition for liquidation under the Bankruptcy Act, 1869, and their creditors duly resolved to accept a composition. The holders of the bills, by arrangement between themselves and the plaintiff, claimed and were paid the composition on the total amounts of the bills, the plaintiff paying them the balance thereof. The plaintiff did not send in any proof or claim any dividend, but he realized his security by sale of the goods deposited and claimed to hold the proceeds against the balance so paid by him upon the bills:—*Held*, affirming the decision of the Queen's Bench Division, that the plaintiff had no right to do so, as by such arrangement the holders of the bills had in effect received the composition for the benefit of the plaintiff, so that according to the bankrupt law he was bound to account to the defendants for the amount by which the composition paid on the bills exceeded that which would have been paid if the value of the security had been previously deducted. BAINES *v.* WRIGHT - - - C.A. 330

5. —— *County Court—Jurisdiction—Fraudulent Preference—"Claim arising out of the bankruptcy"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 102.] The bankrupt carried on business as a corn merchant at Southampton, where his stores were under the charge of a manager. On the 8th of June the appellants, to whom the bankrupt was largely indebted for wheat then in his stores, were informed that the bankrupt was in difficulties, and thereupon arranged with the manager to repurchase the wheat on credit at a price exceeding 200*l.* The wheat was accordingly delivered to them on the following day. This sale was unknown to the bankrupt, who on the 8th of June sent out by post notices of suspension, which were delivered to the manager at Southampton and to the appellants on the following morning:—*Held* (by Cave and Day, JJ.), that under s. 102 of the Bankruptcy Act, 1883, it was competent for the county court acting in bankruptcy to adjudicate upon a claim by the bankrupt's trustee for the return of the wheat by the appellant, or payment of its value, for it must be taken to be "a claim arising out of the bankruptcy." IN RE HAWKE. EX PARTE SCOTT - - - - - 503

6. —— *Practice—Judgment Debtor Summons —Order of High Court for Payment of Costs—Power of County Court to order Payment by Instalments—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 103, *sub-s.* 4—*County Courts Consolidated Orders*, 1875, *Order* XIX., *r.* 9—*Forms* 40, 235.] Where the High Court has simply made an order for the payment of costs, or given judgment for the payment of a sum of money, a county court can, by virtue of the Debtors Act, 1869, s. 5, and the Bankruptcy Act, 1883, s. 103, sub-s. 4, enforce that order or judgment by directing payment of the amount thereof by instalments. A county court cannot, however, rescind or vary an order of the High Court for the payment of a judgment debt by instalments, since in such a case the High Court has considered and adjudicated upon the question of the debtor's ability to pay forthwith.—*Washer* v. *Elliot* (1 C. P. D. 169) explained. IN RE IVES. EX PARTE ADDINGTON [665

7. —— *Life Interest—Proposed by Trustee to insure Bankrupt's Life—Medical Examination—Bankruptcy Act*, 1869, *s.* 19—*Bankruptcy Act*, 1883, *s.* 24.] The Court has no jurisdiction under s. 19 of the Bankruptcy Act, 1869 (re-enacted in s. 24 of the Bankruptcy Act, 1883), to compel a bankrupt to answer questions or to submit to a medical examination, for the purpose of enabling the trustee to effect an insurance on the bankrupt's life with a view to increase the saleable value of the bankrupt's life interest in certain property. IN RE GARNETT. EX PARTE BULLOCK - - - - - 698

8. —— *Proof—Postponement of Charge at Request of Bankrupt—Implied Promise to indemnify.*] In order to enable a mortgagor to obtain a further advance from the first mortgagee on the security of the mortgaged property, the second mortgagee agreed to postpone his charge to a then existing third charge in favour of the first

BANKRUPTCY—*continued.*

mortgagee, and to the fresh advance. The mortgagor became bankrupt, and, when the property was afterwards sold by the first mortgagee, the proceeds of sale were insufficient to pay the whole amount due to him, though they exceeded the amount of the first mortgage:—*Held*, that the second mortgagee was entitled to prove in the bankruptcy for the amount which he would have received out of the proceeds of sale if he had not consented to postpone his charge, on the ground that the Court was entitled to infer an implied promise by the bankrupt to indemnify the second mortgagee against any loss which might result from the postponement of his charge. EX PARTE FORD. IN RE CHAPPELL - C. A. 305

9. —— *Receiving Order—Jurisdiction—Domicil of Debtor—Residence—Onus of Proof—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 1 (*d*), *s.* 95.] The onus is on the petitioning creditor to prove that the debtor's domicil is English, as required by s. 6, sub-s. 1 (*d*) of the Bankruptcy Act, 1883, and that his residence has been such as to give the High Court jurisdiction under s. 95. But, if there is no reason to suppose that the debtor will dispute that his domicil is English, or that the petition is presented in the right court, the petitioning creditor need not in the first instance adduce evidence of either of those facts.—*Ex parte Cunningham* (13 Q. B. D. 418) explained. EX PARTE BARNE. IN RE BARNE - - - - - C. A. 522

10. —— *Trader—Husband and Wife—Proof by Wife for Loan out of her Separate Estate—Right to vote and receive Dividends—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 3.] When a married woman seeks to prove under her husband's bankruptcy for money lent by her to him, she must shew that the money was not lent for the purposes of his trade or business.—If she fails to do so, she cannot prove or vote until all the other creditors have been paid 20*s.* in the pound. IN RE GENESE. EX PARTE DISTRICT BANK OF LONDON - - - 700

11. —— *Trustee in Bankruptcy—Payment of Money under Mistake of Law—Right of Payer to recover.*] The ordinary rule as between litigant parties, that money paid under a mistake of law cannot be recovered, does not apply to a payment made under such a mistake to the trustee in a bankruptcy.—The trustee being an officer of the Court, the Court, when the mistake is discovered, will direct him to refund the money, if it is still in his hands; and, if it has been applied in the payment of dividends to the creditors under the bankruptcy, the Court will direct the trustee to repay it out of other moneys coming to his hands, and applicable to the payment of dividends to the creditors.—*Ex parte James* (Law Rep. 9 Ch. 609) followed and extended. EX PARTE SIMMONDS. IN RE CARNAC - C. A. 308

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BILL OF EXCHANGE—*Bill drawn Abroad upon Acceptor in England—Bankruptcy of Acceptor—Proof for Re-exchange—Measure of Damages—Law of Tobago—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 57 (*sub-s.* 2), 97.] Sect. 57 of the Bills of Exchange Act, 1882, is intended to describe the damages which may be treated as liquidated damages for the purpose of being specially indorsed on a writ, when the drawer of a dishonoured bill desires to proceed under Order XIV. of the Rules of the Supreme Court, 1883. It does not deprive the drawer of the right to recover from the acceptor any special damage of an unliquidated character which he can shew that he has sustained.—It is still, therefore, the law, as laid down in *Walker* v. *Hamilton* (1 D. F. & J. 602) and *In re General South American Co.* (7 Ch. D. 637) that the drawer of a bill of exchange in a foreign country accepted in England is entitled, upon the bill being dishonoured and protested, to recover from the acceptor, not only the amount of the bill with interest, but also such reasonable expenses as may have been caused by the dishonour, including the expenses of re-exchange. IN RE GILLESPIE. EX PARTE ROBARTS - - - - - 702

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BILL OF LADING—"Dangers and accidents of the seas"—Hole made by rats—Damage by sea water—Absence of negligence
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BILL OF SALE—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43)—*Form in Schedule, Deviation from—Lump Sum for Interest.*] A bill of sale, given to secure repayment of money, provided that the sum advanced, together with 15*l.* for agreed interest and bonus thereon, making in all 130*l.*, should be paid by monthly instalments of 10*l.* 16*s.* 8*d.*; that the grantee might seize the goods assigned if the grantor made default in payment of the sum thereby secured at the time therein provided for payment, or in the performance of any of the covenants therein contained, and necessary for maintaining the security; and that, if the grantee seized the goods in consequence of a breach of any of the covenants therein mentioned, he might sell the same or any part thereof at the expiration of five clear days from the day of seizure:—*Held*, that the bill of sale was void as substantially deviating from the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, first, because it would entitle the grantee to seize and sell the goods for the whole 130*l.* secured on failure in payment of any one monthly instalment; secondly, because, the bill of sale not stating how much of the 15*l.* was bonus and how much interest, it was impossible to tell from its terms what was to be paid for interest.—*Semble*, that, even if the whole 15*l.* were to be regarded as interest, the bill of sale was void because it

BILL OF SALE—*continued.*

did not shew the rate of interest to be paid as required by the statutory form.—*Thorpe* v. *Cregeen* (55 L. J. (Q. B.) 80) questioned. MYERS *v.* ELLIOTT - - - - - C. A. 526

2. —— *Bill of Sale given by Equitable Owner—Bills of Sale Act*, 1878 (41 & 42 *Vict.* 31)—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).] Upon a judgment against a husband and wife jointly, certain household furniture was taken in execution at the house where they resided. On an interpleader issue to try the title to such furniture as between the execution creditors and claimants, it appeared that before the marriage the husband had executed a deed declaring that the goods in question, which then belonged to the wife, should after the marriage continue to belong to her for her sole and separate use. The wife assigned the goods to the claimants by a bill of sale made prior to the execution and duly registered under the Bills of Sale Acts, 1878 and 1882, to which the husband was no party:—*Held*, that the bill of sale executed by the wife was valid under the Bills of Sale Acts, and that the claimants were entitled to the goods as against the execution creditors.—*Chapman* v. *Knight* (5 C. P. D. 308) discussed. WALROND *v.* GOLDMANN - - - - - 121

3. —— *Form—Chattels wearing out—Replacing by others—Power of Sale—Defeasance of Security—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).] A bill of sale of household furniture contained an agreement that the grantor should replace any chattels and things that should be worn out by other articles of equal value, a clause permitting seizure and sale in certain events, and an agreement that the grantee after the sale might retain out of the sale moneys the cost of (among other things) discharging any distress, execution, or other incumbrance on the chattels, and of their removal, warehousing, valuing, or sale. The form in the schedule to the Act permits the introduction of terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security:—*Held*, that the expression "defeasance" is large enough to include realization; that the stipulations in the deed related either to the maintenance or the realization of the security; and that the deed was substantially in conformity with the statutory form, and was valid. CONSOLIDATED CREDIT CORPORATION *v.* GOSNEY - 24

4. —— *Validity*—"*Licence to take possession of personal chattels as security for any debt*"—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 7, 9.] A document giving a licence to take immediate possession of goods as a security for a debt is a bill of sale within s. 4 of the Bills of Sale Act, 1878, and is, therefore, also a bill of sale within the Bills of Sale Act, 1882.—And although it is, from its nature, impossible that it should be made in the form given in the schedule to the Act of 1882, such a licence is void under s. 9 of that Act as substantially deviating from the prescribed form.—The ratio decidendi of *Ex parte Close* (14 Q. B. D. 386) and *In re Cunningham & Co.* (28 Ch. D. 682) disapproved. EX PARTE PARSONS. IN RE TOWNSEND - - - - - - C. A. 532

BILL OF SALE—*continued.*

BURIAL BOARD—Division of parish—Sexton—Apportionment of fees - - 58
See ECCLESIASTICAL LAW.

BY-LAW—*Unreasonableness—Music in Street, Prohibition of, on Sunday—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 23.] A by-law made by the council of a borough under the 23rd section of the Municipal Corporations Act, 1882, provided that no person not being a member of Her Majesty's Army or Auxiliary Forces, acting under the orders of his commanding officer, should sound or play upon any musical instrument in any of the streets in the borough on Sunday:—*Held*, that such by-law was unreasonable and ultra vires, and therefore void. JOHNSON *v.* MAYOR, &C., OF CROYDON - 708

CASES:—*Angell* v. *Vestry of Paddington* (Law Rep. 3 Q. B. 714) commented on 379
See METROPOLIS MANAGEMENT ACTS.

—— *Bartlett* v. *Gibbs* (5 M. & G. 81) approved and acted on - - - 279
See PARLIAMENT. 3.

—— *Baxter* v. *Brown* (7 M. & G. 198) discussed and distinguished - - - 270
See PARLIAMENT. 9.

—— *Blackett* v. *Royal Exchange Assurance Co.* (2 C. & J. 244) distinguished - 619
See INSURANCE (MARINE).

—— *Boycott, In re* (29 Ch. D. 571) commented on - - - - - 673
See PRACTICE. 4.

—— *Bradley* v. *Cartwright* (Law Rep. 2 C. P. 511) explained and distinguished - 85
See WILL.

—— *Caiger* v. *Vestry of St. Mary, Islington* (50 L. J. (M. C.) 59) commented on - 379
See METROPOLIS MANAGEMENT ACTS.

—— *Chapman* v. *Knight* (5 C. P. D. 308) discussed - - - - 121
See BILL OF SALE. 2.

—— *Close, Ex parte* (14 Q. B. D. 386) disapproved - - - - 532
See BILL OF SALE. 4.

—— *Cooper* v. *Busbridge* (16 L. T. Rep. (N.S.) 5) discussed - - - - 40
See COUNTY COURT.

—— *Cunliffe* v. *Brancker* (3 Ch. D. 393) distinguished - - - - 85
See WILL.

—— *Cunningham, Ex parte* (13 Q. B. D. 418) explained - - - - 522
See BANKRUPTCY. 9.

—— *Cunningham & Co., In re* (28 Ch. D. 682) disapproved - - - - 532
See BILL OF SALE. 4.

—— *Hart's Estate In re* (W. N. 1883, p. 163) distinguished - - - - 85
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CASES—*continued.*

—— *Fletcher* v. *Baker* (Law Rep. 9 Q. B. D. 370) followed - - - - 691
See COUNTY COURT. 2.

—— *Frost* v. *Knight* (Law Rep. 7 Ex. 111) considered - - - - 460
See CONTRACT.

—— *General South American Co., In re* (7 Ch. D. 637) upheld - - - 702
See BILL OF EXCHANGE.

—— *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q. B.) 455) considered - 460
See CONTRACT.

—— *James, Ex parte* (Law Rep. 9 Ch. 609) followed and extended - - 308
See BANKRUPTCY. 11.

—— *Jeffery's Trusts, In re* (Law Rep. 14 Eq. 136) dissented from - - - 85
See WILL.

—— *Kibble, Ex parte* (Law Rep. 10 Ch. 373) discussed and followed - - 315
See BANKRUPTCY.

—— *Malcolm* v. *Hodgkinson* (Law Rep. 8 Q. B. 209) commented on - - 548
See PRACTICE. 3.

—— *New River Company* v. *Mather* (Law Rep. 10 C. P. 442) distinguished - 18
See WATERWORKS.

—— *Pickering* v. *James* (Law Rep. 8 C. P. 489) considered - - - - 739
See PARLIAMENT. 12.

—— *Plumstead Board of Works* v. *British Land Company* (Law Rep. 10 Q. B. 203) 475
See METROPOLIS MANAGEMENT ACTS. 2.

—— *Porrett* v. *Lord* (5 C. P. D. 65) dissented from
See PARLIAMENT. 3. [279

—— *Reg.* v. *Ashwell* (16 Q. B. D. 133) distinguished and discussed - - 643
See CRIMINAL LAW. 6.

—— *Reg.* v. *Kingston-upon-Hull Docks* (7 Q. B. 2) distinguished - - - 493
See POOR-RATE.

—— *St. Giles, Camberwell* (*Vestry of*) v. *Weller* (Law Rep. 6 Q. B. D. 168, n) approved and followed - - - 475
See METROPOLIS MANAGEMENT ACTS.

—— *Salm Kyrburg* v. *Posnanski* (13 Q. B. D. 218) followed - - - - 187
See PRACTICE.

—— *Sawyer* v. *Paddington Vestry* (Law Rep. 6 Q. B. 164) dissented from - 475
See METROPOLIS MANAGEMENT ACTS. 2.

—— *Sheffield* v. *Fulham Board* (1 Ex. D. 395) approved and followed - - 475
See METROPOLIS MANAGEMENT ACTS. 2.

—— *Shelley's Case* (1 Rep. 93 b) - - 85
See WILL.

—— *Thorpe* v. *Cregeen* (55 L. J. (Q. B.) 80) questioned - - - - 526
See BILL OF SALE.

—— *Walker* v. *Hamilton* (1 D. F. & J. 602) upheld - - - - 702
See BILL OF EXCHANGE.

—— *Washer* v. *Elliot* (1 C. P. D. 169) explained
See BANKRUPTCY. 6. [665

CARRIER — Charterparty — Bill of lading—"Dangers and accident of the seas"—Hole made by rats—Damage by sea water—Absence of negligence - - 629
See SHIP.

CEMETERY—Division of parish—Sexton—Apportionment of fees - - 58
See ECCLESIASTICAL LAW.

CHAPEL—New street—Sewering and paving—"Owner" - - - - 379
See METROPOLIS MANAGEMENT ACTS.

CHARGING ORDER—Bankruptcy—"Execution against goods of debtor"—Secured creditor - - - - 515
See BANKRUPTCY. 3.

CHARITY—Home used for purposes of—Public charity—District rates—Exemption 163
See RATEABILITY.

CHARTERPARTY—"Dangers and accidents of the seas"—Hole made by rats—Damage by sea water—Absence of negligence
See SHIP. [629

—— Demurrage—Lay days—Unusual place of discharge - - - - 67
See SHIP. 2.

COMMISSIONERS — Sewers — Jurisdiction — Walls, banks, and defences - 754
See SEWERS, COMMISSIONERS OF.

COMPENSATION—House "injuriously affected"—Special value as public house 227
See LANDS CLAUSES ACTS.

COMPOSITION—Bankruptcy—Approval of Court—Discretion of registrar - - 330
See BANKRUPTCY. 4.

COMPOUNDING FELONY—Agreement not to prosecute by person not owner of goods stolen - - - - 141
See CRIMINAL LAW. 2.

CONDITION PRECEDENT — Independent covenant - - - - - 117
See LANDLORD AND TENANT. 2.

CONTRACT—Breach—Measure of damages 605
See DAMAGES.

CONTRACT—*Contract, Breach of, by Repudiation before Time for Performance—Declaration of Inability to perform—Election, Breach at—Landlord and Tenant—Lease, Covenant to rebuild in.*] In a lease of premises for a term of twenty-one years determinable by the lessee at the end of the first four years by a six months' notice, the lessor covenanted to rebuild the premises after the expiration of the first four years of the term upon a six months' notice from the lessee requiring him to do so. Before the expiration of the first four years of the term the lessor on many occasions told the lessee that he would be unable to procure the money for rebuilding the premises. The lessee in consequence of this statement by the lessor gave the requisite notice under the provisions of the lease to determine the term at the end of the first four years. After the determination of the lease he continued to occupy the premises for some months, paying rent to the lessor's mortgagees, on the chance, as he stated, of the

CONTRACT—*continued.*
lessor's procuring the money to rebuild. The lessor being, however, unable to rebuild the premises, the lessee claimed damages against him for breach of the contract to do so:—*Held*, that, the covenant to rebuild never having been actually broken, because the lessee had before the time for its performance determined the term, he could not recover unless there had been a breach of contract by anticipation within the doctrine of *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q.B.) 455) and *Frost* v. *Knight* (Law Rep. 7 Ex. 111) by reason of a wrongful repudiation of his covenant by the lessor before the time for performance; that what had been said by the lessor did not under the circumstances of the case amount to such a repudiation; and that, if it did, such repudiation before the time of performance arrived would not amount to a breach of the contract, unless the lessee elected to treat it as putting an end to the contract except for the purposes of an action for such breach, and the lessee had not under the circumstances so elected; and that he could not therefore maintain his claim.—*Quære*, whether the doctrine of *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q.B.) 455) can be applicable to the case of a lease or other contract containing various stipulations where the whole contract cannot be treated as put an end to upon the wrongful repudiation of one of the stipulations of the contract by the promisor. JOHNSTONE *v.* MILLING - - - - - 460

—— Conclusion of—Agreement for insurance—Proposal and acceptance—Alteration of risk, before tender of premium - 727
See INSURANCE (LIFE).

CONTRIBUTION—*Joint Adventure — Equitable Contribution in Respect of Default in Payment of a Loss by one of the contracting Parties—Judicature Act*, 1873, *s.* 25, *sub-s.* 11.] By agreement between the plaintiffs, the defendants, and Messrs. L., B., & Co., a cargo of Californian wheat was to be shipped for their joint account by the correspondents of L., B., & Co. at San Francisco, consigned to the plaintiffs at Liverpool for sale upon certain special terms; the shippers to reimburse themselves for cost and insurance of the cargo by drafts on the plaintiffs at sixty days' sight to the extent of 45*s.* per quarter, less freight, and for the balance of invoice amount by separate drafts at sixty days' sight upon each of the above parties for one-third of the excess.—The cargo was shipped, and a bill was drawn by the San Francisco house for 29,353*l.* 18*s.* 1*d.* on account of the invoice price of the wheat, less freight, upon the plaintiffs, and was duly accepted and paid by them, together with freight, insurance, and other charges in respect of the cargo; and the wheat on arrival was sold by the plaintiffs at a loss.—In December, 1883, L., B., & Co. became insolvent and compounded with their creditors for 30 per cent. of their liabilities, which composition the plaintiffs received, leaving an unpaid balance of 1760*l.* 10*s.* 9*d.* due from that firm for their share of the loss on the adventure:—*Held*, upon further consideration (the judge to draw inferences of fact), that the purchase and shipment of the wheat was a joint partnership adventure, each of the three firms to participate equally in

CONTRIBUTION—*continued.*
the profit or loss; and that the defendants, according to the rule of equity, which since the Judicature Act, 1873, is to prevail, were liable to contribute equally with the plaintiffs to make good the default of L., B., & Co. LOWE *v.* DIXON [455

CONUSANCE—Oxford University, Chancellor's Court—Plaintiff resident out of city of Oxford - - - - 761
See UNIVERSITY.

CONVERSION—Accumulation of personal estate—Investment in realty - - 408
See REVENUE.

CORRUPT PRACTICES — Municipal election Agency—Evidence - - 44
See MUNICIPAL CORPORATION. 2.

COSTS—County Court—Administration action—Discretion of judge - - 40
See COUNTY COURT.

—— Security for—Insolvent plaintiff—Receiving order—Bankruptcy—Interpleader issue
See PRACTICE. 3. [548

—— Taxation—Fees to counsel—Refreshers on argument - - - - 27
See PRACTICE. 5.

—— Taxation — Solicitor and client — Lapse of twelve months — "Special circumstances" - - - - 673
See PRACTICE. 4.

COUNTY COURT—*Costs — Practice — Discretion —Equitable Jurisdiction—Administration Action* —9 *&* 10 *Vict. c.* 95, *s.* 88—28 *&* 29 *Vict. c.* 99, *s.* 21.] A county court judge is not bound by the rule in equity which prevailed before the Judicature Acts,—that the plaintiff in an administration suit, properly brought, was entitled to his costs out of the estate. The judge has, by virtue of 9 & 10 Vict. c. 95, s. 88, and 28 & 29 Vict. c. 99, s. 21, an absolute discretion over such costs, and may therefore order the plaintiff to pay the costs of the action, and no appeal will lie against his order.—*Cooper* v. *Busbridge* (16 L. T. Rep. (N.S.) 5) discussed. PLUMB *v.* CRAKER - - 40

2. —— *Practice — Notice of Demand for a Jury—Time, Computation of—Fifteen Days before "Return Day"—Employers' Liability Act*, 1880 (43 *&* 44 *Vict. c.* 42—*County Court Rules* 1875, *Order XXXIX. b, r.* 4.] Under Order XXXIX. b, r. 4, of the County Court Rules, 1875, —which directs that notice of a demand for a jury in actions brought under the Employers' Liability Act, 1880, shall be given to the registrar of the Court fifteen clear days at least before the return day,—the notice must be given fifteen clear days before the day originally fixed for the return of the summons and not before a day to which the hearing has been adjourned. *Fletcher* v. *Baker* (Law Rep. 9 Q. B. 370) followed. THE QUEEN *v.* REGISTRAR OF THE COUNTY COURT AT LEEDS - - - - - - 691

—— Bankruptcy—"Claim arising out of the bankruptcy"—Fraudulent preference
See BANKRUPTCY. 5. [503

COUNTY COURT—*continued.*

—— Judgment summons—Order of High Court—Power to order payment by instalments. - - - - 665
See BANKRUPTCY. 6.

—— Remission of action to—Counter-claim for unliquidated damages - - 174
See PRACTICE. 6.

COVENANT — Breach—Repudiation — Landlord and tenant - - - - 460
See CONTRACT.

—— By lessee to pay sales, assessments, and impositions—Immunities of ambassador
See INTERNATIONAL LAW. [152

—— For quiet enjoyment—Breach—Notice to tenants not to pay rent - - 117
See LANDLORD AND TENANT. 2.

CRIMINAL LAW — *Undischarged Bankrupt — "Obtaining credit"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 31—*Jurisdiction.*] In order to convict an undischarged bankrupt under 46 & 47 Vict. c. 52, s. 31, of the offence of "obtaining credit to the amount of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt," it is not necessary that there should be a stipulation to grant credit in the contract between the parties; it is sufficient if a credit in fact is obtained.—The prisoner, an undischarged bankrupt living in Newcastle-on-Tyne, bought a horse from the prosecutor, a farmer in Ireland, for 22*l.*, free of expenses to the vendor, who by the prisoner's direction delivered the horse on board a steamer at Larne; no stipulation was made as to the time or mode of payment, and the prisoner did not disclose the fact that he was an undischarged bankrupt. The prisoner paid for the carriage of the horse on its delivery to him at Newcastle, and immediately sold it, and refused to pay the price to the prosecutor:—*Held*, by Lord Coleridge, C.J., Hawkins, Day, and Grantham, JJ.: Manisty, J., dissenting, that there was evidence to go to the jury of an obtaining of credit by the prisoner within the meaning of s. 31 of the Bankruptcy Act, 1883:—*Held*, also, that the offence was committed in Newcastle-on-Tyne. THE QUEEN *v.* PETERS - - - - - C. C. R. 636

2. —— *Compounding a Larceny, who may be guilty of—Agreement not to prosecute by Person not Owner of Goods stolen—Indictment for compounding Felony, what essential in.*] An indictment for compounding a felony need not allege that the defendant desisted from prosecuting the felon.—The offence of compounding a larceny may be committed by a person other than the owner of the goods stolen or a material witness for the prosecution. THE QUEEN *v.* BURGESS C. C. R. 141

3. —— *Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 6—*Suffering Girl under Sixteen to be on Premises for the Purpose of being carnally known.*] The prisoner was convicted under the 6th section of the Criminal Law Amendment Act, 1885, of knowingly suffering a girl under sixteen to be on premises for the purpose mentioned in that section. The girl in question was the prisoner's daughter, and the premises in respect of which the charge was made were her home where she resided with the prisoner:—*Held*, that, notwithstanding the above-mentioned circumstances, the conviction was good. THE QUEEN *v.* WEBSTER - - - - C. C. R. 134

4. —— *Embezzling Moneys of Copartnership—"Copartnership"—Meaning of the Word*—31 & 32 *Vict. c.* 116, *s.* 1—*Association not for Purposes of Gain.*] An association having for its object not the acquisition of gain but the spiritual and mental improvement of its members is not a "copartnership" within the meaning of the term as used in 31 & 32 Vict. c. 116, s. 1. Consequently a member of such an association who has embezzled moneys belonging to it cannot be convicted under the above-mentioned Act of embezzling the moneys of a "copartnership." THE QUEEN *v.* ROBSON - - - - C. C. R. 137

5. —— *Extradition*—33 & 34 *Vict. c.* 52—*Larceny Act*, 24 & 25 *Vict. c.* 96, *s.* 75—*Fraudulent Misappropriation—"Banker, merchant, broker, attorney, or other agent"—Habeas Corpus—Practice.*] In 24 & 25 Vict. c. 96, s. 75,—which enacts that whosoever, having been intrusted as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith and contrary to the object or purpose for which such chattel, security, &c., was intrusted to him, sell, negotiate, &c., or in any manner convert to his own use or benefit such chattel or security, shall be guilty of a misdemeanour,—the words "or other agent" apply to persons whose occupation is similar to those enumerated in the section, and do not include any ordinary agent who may from time to time be intrusted with valuable securities.—Where, therefore, the prisoner, who was not a banker, merchant, broker, or attorney, was employed by the prosecutors, who were railway contractors, to procure for them a contract for the construction of a foreign railway, and was charged under s. 75, with having misappropriated valuable securities with which the prosecutors had intrusted him in the course of his employment:—*Held*, that the facts disclosed no offence within the meaning of the section, and that the prisoner was not liable to be committed with a view to his extradition. THE QUEEN *v.* PORTUGAL - - - - - 487

6. —— *Larceny—Taking invito domino—Delivery of Chattel under Mistake as to its Character—Mistake common to both Parties—Subsequent fraudulent Appropriation.*] The prisoner asked the prosecutor for the loan of a shilling. The prosecutor gave the prisoner a sovereign believing it to be a shilling, and the prisoner took the coin under the same belief. Some time afterwards he discovered that the coin was a sovereign, and then and there fraudulently appropriated it to his own use. The prisoner was convicted of larceny of the sovereign:—*Held*, that the prisoner had not been guilty of larceny as a bailee; but—The Court being equally divided as to whether the prisoner had been guilty of larceny at common law, the conviction stood. THE QUEEN *v.* ASHWELL - - - - C. C. 190

7. —— *Larceny—Delivery of Chattel under Mistake common to both Parties—Innocent Receipt by Prisoner—Subsequent Fraudulent Misappro-*

CRIMINAL LAW—*continued.*
priation.] The old rule of law that the innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny, is not affected by the decision in *Reg.* v. *Ashwell* (16 Q. B. D. 190). That case distinguished and discussed. THE QUEEN *v.* FLOWERS - - - - - C. C. 643
—— Defamation—Criminal proceedings by wife against husband - - - 772
See HUSBAND AND WIFE. 2.

DAMAGES—*Measure of—Contract—Breach.*] A "boat-staging" or suspended platform, put up for the plaintiffs by the defendant under a contract between them, to enable the plaintiffs to paint a house, fell, through being insecurely fastened by the defendant, and hurt a painter in the employment of the plaintiffs. He brought an action under the Employers' Liability Act (43 & 44 Vict. c. 32) against the plaintiffs for injuries sustained in consequence of the defective state of the boat-staging. The plaintiffs settled the action by paying to the painter 125*l.*, and then sued the defendant for breach of his contract:—*Held*, that the defendant was liable under the contract; but that, inasmuch as the plaintiffs had employed a competent contractor to put up the boat-staging, and there was, on the facts, no evidence of negligence by the plaintiffs, they were not liable to their servant for the injury he had sustained, and therefore the money which they had paid to settle his action was not recoverable as damages from the defendant for his breach of contract. KIDDLE *v.* LOVETT - - 605

2. —— *Measure of—Landlord and Tenant—Action for Waste by Reversioner against Tenant.*] A covenant by a tenant not to commit waste on the demised property is not with regard to the measure of damages for the breach of it the same thing as a covenant to deliver up the property at the end of the term in the same state as that in which the tenant received it.—Therefore, in an action by the reversioner against the tenant for waste, the measure of damages is not necessarily the sum which it would cost to restore the property to its condition before the waste; the true measure of damages is the diminution in the value of the reversion, less a discount for immediate payment. WHITHAM *v.* KERSHAW - C. A. 613
—— Measure of—Foreign bill of exchange—Action by drawer against acceptor—Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 57 (sub-s. 21, 97) - - 702
See BILL OF EXCHANGE.

DEFAMATION—*Libel—Publication—Newspaper—Liability of Vendor in Ordinary course of Business.*] The vendor of a newspaper in the ordinary course of his business, though he is primâ facie liable for a libel contained in it, is not liable, if he can prove that he did not know that it contained a libel; that his ignorance was not due to any negligence on his own part; and that he did not know, and had no ground for supposing, that the newspaper was likely to contain libellous matter. If he can prove those facts he is not a publisher of the libel.—But whether such a person can escape liability for the libel if he knows, or ought

DEFAMATION—*continued.*
to know, that the newspaper is likely to contain libellous matter, *Quære.* EMMENS *v.* POTTLE [C. A. 354

2. —— *Privileged Occasion—Absolute Privilege—Letter to Lords of the Privy Council.*] An action of libel may be maintained for statements in a letter addressed to the Privy Council injurious to the character of the plaintiff, a public officer removable by the Privy Council, upon proof of express malice in the defendant. PROCTOR *v.* WEBSTER - - - - - 112

DEMURRAGE—Lay days—Usual place of discharge—Charterparty - - 67
See SHIP. 2.

DIPLOMACY—Immunities of ambassador—Attaché of embassy—Covenant by lessee to pay rates, assessments and impositions - - - - 152
See INTERNATIONAL LAW.

DISCOVERY—Co-defendant - - 125
See PRACTICE. 7.
—— Correspondence between defendant and person other than plaintiff—Privilege 561
See PRACTICE. 10.
—— Production of documents for inspection—Common interest - - - 229
See PRACTICE. 9.

DISTRESS—Lodger's goods—Statement by lodger omitting particulars - - 130
See LANDLORD AND TENANT.

DOMICIL—Debtor—Bankruptcy—Jurisdiction of High Court—Onus of proof - 522
See BANKRUPTCY. 9.

DWELLING-HOUSE—Occupation — Parliamentary franchise—Non-commissioned officer—Rooms in barracks - - 254
See PARLIAMENT. 2.
—— Occupation — Parliamentary franchise — Rooms in workhouse—Industrial trainer
See PARLIAMENT. 4. [239
—— Parliamentary franchise — Universities of Oxford and Cambridge—Occupation of college rooms - - - 231
See PARLIAMENT. 6.

ECCLESIASTICAL LAW—*Formation of Districts under 6 & 7 Vict. c. 37—Burial Board—Cemetery Sexton's Fees.*] The precinct or chapelry of N. became long before 1859, by augmentation of Queen Anne's bounty, a perpetual curacy, and was treated as a separate and distinct parish for all civil purposes,—baptisms, marriages, and burials being performed in the chapel and the burial-ground thereto belonging. In 1850, a portion of the precinct of N. was assigned to St. John's Church, Southall, which district became under 6 & 7 Vict. c. 37 and other Acts a new parish for all ecclesiastical purposes.—By Order in Council of May, 1859, the chapelry of N., except the part so assigned to St. John's, was constituted a separate parish for ecclesiastical purposes; and the chapel became the parish church of N. In 1860, a piece of land adjoining St. John's Church, which had been conveyed to the ecclesiastical commissioners for the purpose of a burial-ground for that district (there having been previously no burial-

ECCLESIASTICAL LAW—*continued.*
ground within the district, and the parishioners thereof having been buried in the churchyard of N.) was consecrated as such burial-ground, and used as the burial-ground both of the parish of St. John and the perpetual curacy of N. The sexton of St. John's performed the duties and received the fees for interments in the churchyard of St. John's. By an Order in Council of September, 1880, a portion of the parish or perpetual curacy of N. was assigned to St. John's, and became under the provisions of 32 & 33 Vict. c. 94, s. 1, a part of that parish.—In 1881, a burial board was formed for the whole poor-law parish of N. (including St. John's and the perpetual curacy of N.), and they provided a cemetery for the whole district—the churchyard at N. being closed for burials.—The statute under which the Orders in Council were made (6 & 7 Vict. c. 37) makes provision for all other persons affected by the change, but is silent as to the position of the sexton and his fees;—*Held*, that the plaintiff (who had been appointed sexton of N. in 1865) was not entitled to fees in respect of burials in the cemetery from that portion of the parish of N. which had been annexed to the parish of St. John; but that the burial-board had a right to apportion the burial fees in accordance with the limits of the two parishes. WHITE *v.* NORWOOD BURIAL BOARD - - - - 58

EMBEZZLEMENT—Copartnership—Association for purposes unconnected with gain 137
See CRIMINAL LAW. 4.

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FISH—*Freshwater Fisheries Act*, 1878 (41 & 42 *Vict. c.* 39), *s.* 11, *sub-s.* 4—*Exposing Fish for sale in Close Season—Eels caught out of England.*] The 4th sub-section of the 11th section of the Freshwater Fisheries Act, 1878, which forbids the sale or exposure for sale of freshwater fish during the close season, applies to fish caught beyond the limits of that part of the United Kingdom to which the Act applies. PRICE *v.* BRADLEY 148

GENERAL AVERAGE—Security for payment—Deposit - - - - 442
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—— Security for payment—Deposit—Unreasonable terms - - - - 735
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HIGHWAY—*Summary Proceedings for non-repair—Highway District—Admission by Waywarden—How far binding on Highway Board—5 & 6 Wm. 4, c. 50, ss. 94, 95; 25 & 26 Vict. c. 61, s. 18; 41 & 42 Vict. c. 77, ss. 3, 5, 7.*] Where proceedings are taken before justices for the non-repair of a highway in a parish forming part of a highway district under 25 & 26 Vict. c. 61, a bonâ fide admission by the waywarden of the parish that the road is a highway which the parish is bound to repair is binding on the highway board, and it is not competent for them after such an admission to deny these facts so as to oust the jurisdiction of the justices. LOUGHBOROUGH HIGHWAY BOARD *v.* CURZON - - - - - 565

HUSBAND AND WIFE—*Action by Husband against Wife—Separate Estate—Money paid by Husband for Wife after Marriage—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75).] Before the coming into operation of the Married Women's Property Act, 1882, a husband in a court of equity might make his wife a defendant to a suit respecting her separate estate, and might obtain a decree against her for breach of any contract, whereby she had intended to bind the same, and that statute has not deprived a husband of any right or remedy, to which, if it had not been passed, he would have been entitled as against his wife in respect of her separate estate; and therefore it is now competent to a husband to maintain an action against his wife, and to charge her separate estate for money lent by him to her after their marriage, and for money paid by him for her after their marriage at her request made before or after their marriage.—Judgment of Wills, J. (14 Q. B. D. 831) affirmed. BUTLER *v.* BUTLER - - - - C. A. 374

2. —— *Criminal Law—Defamation—Criminal Proceedings by Wife against Husband—Married Women's Property Acts*, 1870, 1882, 1884 (33 & 34 *Vict. c.* 93; 45 & 46 *Vict. c.* 75; 47 & 48 *Vict. c.* 14).] A wife could not before and cannot since the Married Women's Property Acts take criminal proceedings against her husband for defamatory libel. THE QUEEN *v.* LORD MAYOR OF LONDON - - - - - 772

—— Bill of sale of wife's separate property—Interpleader - - - - 121
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—— Separate estate—Loan by wife to husband—Proof under husband's bankruptcy
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—— Municipal election—Relief - - 114
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INDICTMENT — Sufficiency — Compounding felony - - - - - 141
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INN—*Conviction of Licensed Person for Offence against Licensing Act*, 1872—*Record of Conviction on License—Owner of Licensed Premises—Right of Appeal—"Person aggrieved"—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 52, 56; *Licensing Act*, 1784 (37 & 38 *Vict. c.* 49), *s.* 13.] Where a licensed person is convicted of an offence under the Licensing Acts, 1872-74, and the justices direct the conviction to be recorded on his license, the owner of the licensed premises, who was not and could not have been a party to the proceedings before the justices, is not a "person aggrieved" within s. 52 of the Act of 1872, and has no right of appeal against the order. The Queen *v.* Justices of Andover - - - - 711

INSURANCE, LIFE—*Agreement for Insurance—Conclusion of Contract—Proposal and Acceptance—Material Alteration of Risk before Tender of Premium.*] A proposal was made to an insurance company for an insurance on the life of the proposer, who made, on a form issued by the company, statements as to his state of health and other matters, and a declaration that the statements were true and were to be taken as the basis of the contract. The proposal was accepted at a specified premium, but upon the terms, that no insurance should take effect till the premium was paid. Before tender of the premium, there was a material alteration in the state of the health of the proposer, and the company refused to accept the premium or to issue a policy:—*Held*, that the nature of the risk having been altered at the time of the tender of the premium there was no contract binding the company to issue a policy.—*Quære*, whether if there had been no alteration in the risk, the company would have been legally entitled to refuse to accept the premium and to issue a policy. Canning *v.* Farquhar **C. A. 727**

—— Bankruptcy—Proposal to insure bankrupt's life—Compulsory medical examination
See Bankruptcy. 7. [698

INSURANCE, MARINE—*Memorandum against Average under 3 per cent.—Adding distinct successive Losses together—Time Policy—Separate and distinct Voyages.*] A time policy upon ship and freight contained the warranty "free from average under 3 per cent. unless general, or the ship be stranded, sunk, or burnt":—*Held*, reversing the Queen's Bench Division, that distinct and separate average losses occurring during the same voyage could be added together so as to ascertain whether the aggregate loss exceeded the limit of 3 per cent., but not such losses occurring in more than one voyage.—*Blackett* v. *Royal Exchange Assurance Co.* (2 C. & J. 244) distinguished. Stewart *v.* Merchants' Marine Insurance Company - - - - - **C. A. 619**

INTERNATIONAL LAW—*Ambassador, Immunities of—Attaché of Embassy—Ex-territoriality—Parochial Rates—Landlord and Tenant—Covenant by Lessee to pay Rents, Assessments, and Impositions.*] A lease of a dwelling-house contained a covenant by the lessee to pay the sewers rate, and all other rates, taxes, assessments, and impositions of what nature or kind soever, and

INTERNATIONAL LAW—*continued.*

whether parliamentary, parochial, or otherwise, which then were, or at any time thereafter during the term should be, assessed, charged, or imposed upon the demised premises, or on the land in respect thereof.—By a local Act relating to parochial rates in the parish in which the demised premises were situated, it was provided that every rate or assessment made, laid, or assessed by virtue of the Act in respect of any land, ground, house, &c., which any ambassador, envoy, resident, agent, or other public minister of any foreign prince or state, or the servant of any such ambassador, envoy, resident, agent, or public minister, or any other person not liable by law to pay such rate or assessment then did or thereafter should inhabit, should be paid by and be recoverable from the landlord, owner, lessor, or proprietor of such land, ground, house, &c.—The lessee of the demised premises assigned the same to an attaché of a foreign embassy who occupied them as his residence. The assignee having claimed exemption from liability to pay a parochial rate made in respect of the premises under the local Act, the parish authorities enforced payment of the same against the lessor.—In an action brought against the lessee by the lessor to recover the amount so paid by him:—*Held*, that payment of the rate was not enforceable against an attaché of a foreign embassy; that the rate was therefore under the local Act recoverable from the lessor: and that the lessee was under the covenant bound to repay to the lessor the amount of the rate so paid by him. Parkinson *v.* Potter - **152**

INTEREST—Rate not specified—Bill of sale—Invalidity - - - - - **526**
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INTERPLEADER—Power to interplead as to part only of a single claim - - **686**
See Practice. 11.

—— Security for costs—Defendant in action **548**
See Practice. 3.

—— Summary decision—Appeal from master to judge - - - - **658**
See Practice. 12.

INTERROGATORIES—Penalties—Action for by common informer - - - **507**
See Practice. 8.

JUDGMENT—Power to inquire into facts—Bankruptcy Court—Jurisdiction - **315**
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JUDGMENT SUMMONS—Order of High Court—County Court—Power to order payment by instalments - - - **665**
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See Bankruptcy. 9.

—— Chancellor's Court, Oxford—Conusance of action—Plaintiff resident out of city of Oxford - - - - **761**
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—— Criminal law—"Obtaining credit" in England—Purchase of goods from seller in Ireland - - - - **636**
See Criminal Law.

JURY—Demand of—County Court—Fifteen days before "return day" - - 691
See COUNTY COURT. 2.

JUSTICES—*Summary Conviction—Penalty, Imprisonment for non-payment of—Hard Labour—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 5.] The 5th section of the Summary Jurisdiction Act, 1879, authorizes the infliction of imprisonment with hard labour for default in payment of a penalty adjudged to be paid by a summary conviction where the Act on which the conviction is founded authorizes the infliction of imprisonment with hard labour as a punishmont for the offence. THE QUEEN *v.* JUSTICES OF TYNEMOUTH - - - - - - 647

JUSTICE—Water-rate—Dispute as to annual value of premises—Jurisdiction - 18
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LANDLORD AND TENANT—*Distress for Rent—Lodgers' Goods, Protection of*—34 & 35 *Vict. c.* 79, *ss.* 1, 2—*Declaration by Lodger—Absence of Statement that Declarant is a Lodger, and whether or no Rent is due.*] A declaration made by a lodger under 34 & 35 Vict. c. 79, s. 1, did not state that the declarant was a lodger, and whether or no any rent was due from the lodger to her immediate landlord, no such rent being in fact due:—*Held*, that such declaration was nevertheless sufficient, on the ground that the Act does not require it to be stated that the declarant is a lodger, and that the declaration stating nothing about rent must be treated as importing that no such rent was due. *Ex parte* HARRIS - 130

2. —— *Quiet Enjoyment, Covenant for, Breach of—Notice to Tenants not to pay Rent—Conditions Precedent—Independent Covenants.*] A lease contained a covenant by the lessors for quiet enjoyment by the lessee in the usual terms, viz., that the lessee paying his rent and performing his covenants should quietly enjoy the premises without interruption from the lessors or any one claiming under them. There were also covenants by the lessee to pay rent and keep the premises in repair. The rent being in arrear and the premises out of repair, the lessors caused notices to be served on the lessee's sub-tenants requiring them not to pay rent to the lessee but to themselves, and threatening legal proceedings in default of compliance with the notice. The lessors though requested to withdraw the notice by the lessee refused to do so for a period of several weeks, and in the meantime, in consequence of the notice, one of the lessee's sub-tenants paid rent to the lessors:—*Held*, that there was evidence of a breach of the covenant for quiet enjoyment, and that, that covenant and the covenants by the lessee to pay rent and repair being independent covenants, an action was maintainable by the lessee. EDGE *v.* BOILEAU - - - - - - 117

—— Covenant—Breach—Repudiation - 460
See CONTRACT.

LANDS CLAUSES ACTS—*Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18)—*House "injuriously affected"—Special Value as a Public-house—Compensation.*] WADHAM *v.* NORTH EASTERN RAILWAY COMPANY - - - - 227

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See CRIMINAL LAW. 6.

—— Delivery of chattel under mistake - 643
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LIBEL—Complaint to Privy Council—Privilege
See DEFAMATION. [112

—— Husband and wife—Criminal proceedings by wife against husband - - 772
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—— Newspaper—Liability of vendor - 354
See DEFAMATION.

LICENSING ACTS—Inn—Conviction of licensed person—Record of conviction on licence
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LIST—Parliamentary franchise—Power to amend description of qualification "Tenement"
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—— Parliamentary franchise—Revision of overseer's list—Power to amend description of qualification - - - 302
See PARLIAMENT. 11.

LOCAL GOVERNMENT ACTS—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94, 96—*Nuisance—Order of Justices to abate Nuisance, whether necessary Works should be specified in.*] An order of justices made under s. 96 of the Public Health Act, 1875, upon the complaint of a local authority, required the owner of premises to abate within a specified time a nuisance arising from untrapped drains, "and to execute such works and do such things as may be necessary for that purpose, so that the same shall no longer be a nuisance or injurious to health":—*Held*, that this order was bad, because it did not specify what works and things the owner should execute and do for the purpose of abating the nuisance. THE QUEEN *v.* WHEATLEY - - - 34

2. —— *Illegal Contract—Penalty—Right of Action—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 193—*Contract with Local Authority by Officer or Servant.*] Sect. 193 of the Public Health Act, 1875, provides that officers or servants employed by a local authority shall not in anywise be concerned or interested in any contract with such authority for any of the purposes of the Act, and that, if any such officer or servant is so concerned or interested, he shall be incapable of afterwards holding or continuing in any office or employment under the Act, and shall forfeit the sum of 50*l.*:—*Held*, that the effect of this section is to render such a contract illegal, and to prevent an officer or servant of a local authority from suing on the contract.—Decision of Cave, J. (14 Q. B. D. 911), reversed.—*Semble*, that if, after the making of a contract with a local authority, an officer of the authority became interested in it, s. 193 would not avoid the contract. MELLISS *v.* SHIRLEY LOCAL BOARD - - - 446

3. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 156—*"Bringing forward" a House—Application of Section to new Buildings on Land never before built upon.*] In the Public Health Act, 1875 (38 & 39 Vict. 55), s. 156,—which enacts that it shall not be lawful in any urban district without the written consent of the urban authority to bring forward any house or building forming part

LOCAL GOVERNMENT ACTS—*continued.*
of any street, or any part thereof, beyond the front wall of the house or building on either side thereof—the expression "house or building" does not include new buildings in course of erection upon land never before built upon. WILLIAMS *v.* WALLASEY LOCAL BOARD - - - 718

4. —— *Street—Apportionment of Expenses—Premises "fronting, adjoining, or abutting"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.] A. B. owned plots of land and cottages thereon, separated from a street by a wall five feet high, which belonged with the land on which it stood to another person. There was a public footway which went between the plots of land, and through an opening in the wall into the middle of the street. The backs only of the cottages fronted the street, and the only way for vehicles from the cottages to the street was by a small roadway, which, without touching that part of the street which had been paved, came into a highway which joined one end of such street. With the exception of the public footway this roadway was the only access from the cottages to the street:—*Held*, affirming the judgment of the Queen's Bench Division, that A. B. was not the owner of premises "fronting, adjoining, or abutting" on the street within the meaning of s. 150 of the Public Health Act, 1875, and therefore was not liable to contribute to the expenses of sewering and paving the street under that section. LIGHTBOUND *v.* HIGHER BEBINGTON LOCAL BOARD [C. A. 577

LOCAL IMPROVEMENT ACT—*Apportionment of Cost of paving, &c., new Streets—Definition of "Owner"—Agent for collection of Rents—32 & 33 Vict. c. cxx., ss.* 4, 98, 99.] By ss. 98 and 99 of the St. Helen's Improvement Act, 1869 (32 & 33 Vict. c. cxx.), the corporation of St. Helen's are, upon failure of the owners of property fronting on a new street to drain, pave, &c., the roadway and paths pursuant to an order, impowered to do the work themselves, and to charge the expenses thereby incurred upon such owners in proportion to their respective frontages; and by the interpretation-clause, s. 4, "owner" is declared to mean "the person for the time being receiving the rackrent of the lands in connection with which the said word is used, whether on his own account or under or by virtue of any mortgage or charge, or as agent or trustee for any other person, . . . and shall include every successive owner from time to time of such land for any part of the time during which the enactment wherein that term is used operates in relation to such land:"—*Held*, that an "agent" employed to collect the rents of the property charged by the apportionment is an "owner" within the Act, and is liable to be called upon to pay, whether he has money of his principal in hand or not, at any time whilst the sum assessed upon the premises remains unpaid. THE MAYOR OF ST. HELEN'S *v.* KIRKHAM - 403

LODGER—Distress for rent—Statement omitting particulars - - - - 130
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LUNATIC—Accumulation of personal estate—Investment in realty - - 408
See REVENUE.

MARRIED WOMAN—Action by husband against wife's separate estate - - 374
See HUSBAND AND WIFE.

—— Right of wife to take criminal proceedings against husband for libel - - 772
See HUSBAND AND WIFE. 2.

MASTER AND SERVANT—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42)—*Defective Machinery.*] The plaintiff, a lad of nineteen, was employed in the defendants' paper-mill at a machine for cutting jute. The material passed under a roller which conveyed it to the cutter; but the roller being in several pieces or sections, with interstices between them into which the jute sometimes got and so impeded the action of the machine, it was necessary (or usual) to remove it by the hand. In doing this the Plaintiff lost three fingers. The defect had been pointed out to the defendants, who to remedy it procured a roller in one piece; but the accident happened before the new roller was placed. The maker swore that, with care, both rollers were equally safe.—The jury having found that the injury to the plaintiff was caused by a defect in the machine known to the defendants and not remedied by them:—*Held*, that this finding was warranted by the evidence. PALEY *v.* GARNETT - - 52

METROPOLIS MANAGEMENT ACTS—*Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*New Street—Liability to Expense of Paving—"House"—"Land"—"Owner"—Trustees of Chapel.*] By the term "houses," in s. 105 of the Metropolis Local Management Act, 1855, and the term "land," in s. 77 of the Metropolis Local Management Act, 1862, it is intended to include (with certain exceptions) all the frontage of a new street, so as to make all the owners of the frontage liable to contribute to the expense of paving the new street.—The word "house" includes every building which is capable of being used as a human habitation. If a building, which is physically capable of being so used, is prevented, either by common law or statute, from being ever put to such a use, it is exempted from the liability to contribute to the expense.—A consecrated church of the Established Church of England is exempted, because, by reason of its consecration, it becomes by the common law for ever incapable of being used as an habitation for man.—But *held*, that a leasehold chapel fronting on a new street, the chapel being vested in turstees, on trust to permit it to be used as a place of religious worship by a congregation of Wesleyans, was a house within the meaning of s. 105, on the ground that, by the consent of the landlord, the trustees, and the cestuis que trustent, the trusts might at any moment be put an end to:—*Held*, also, that the trustees were the "owners" of the chapel, and as such liable to contribute to the expense of paving the new street.—*Angell* v. *Vestry of Paddington* (Law Rep. 3 Q. B. 714); *Caiger* v. *Vestry of St. Mary, Islington* (50 L. J. (M.C.) 59); and other cases commented on. WRIGHT *v.* INGLE C. A. 379

2. —— *Sewers—Expense of constructing—Owners of Land abutting on "Street"—"New Street"—Metropolis Management Acts*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250; *and* 1862 (25 & 26 *Vict.*

METROPOLIS MANAGEMENT ACTS—*continued.*

c. 102), *ss.* 52, 53, 112.] Sect. 52 of the Metropolis Management Act, 1862, enacts that where any sewer shall be constructed for the drainage of any "new street," the expense shall be defrayed by the owners of the land abutting on such street.—Sect. 53 enacts that where any sewer shall be constructed in a street in which there has been no sewer, but where sewers-rates have been levied previously, the expense shall be defrayed in part only by the owners of the houses situate in and of the land abutting on such street; provided that no street or property, in respect of which sewers-rates have been levied for five years prior to the 1st of January, 1856, shall be subject to be charged under this section.—Sect. 112 enacts that ". . . the word 'street' shall be deemed to apply to and include the subject-matters specified in the 250th section of" the Metropolis Management Act, 1855 . . . "the expression 'new street' shall apply to and include all streets to be formed or laid out" after the 7th of August, 1862.—Sect. 250 of the Metropolis Management Act, 1855, enacts that "the word 'street' shall include any highway (except the carriageway of any turnpike road) . . ."—Before the year 1826 a road had been repaired out of the rents and profits of certain lands, which had been settled for its maintenance, and by a statute passed in that year and also by another statute passed in 1829 tolls were collected on the road. In the year 1872 the road ceased to be a turnpike road. The defendant's land abutted on the road: it was mostly building land, but only one house had been erected upon it. The plaintiffs in the year 1883 constructed in front of the defendant's land a sewer in the road; there had been no sewer before that time. Sewers-rates had been levied for five years prior to the 1st of January, 1856, in respect of the whole of the property, of which the defendant was owner. The plaintiffs apportioned part of the cost of making the sewer upon the defendant:—*Held*, that the road was a "street," as defined by s. 112 of the Metropolis Management Act, 1862; and that the word "street" in s. 53 of that statute included "new streets" as defined by s. 112 as well as old streets; that s. 52 did not apply; and that the defendant was not liable to pay any part of the sum apportioned upon him in respect of his land.—*Vestry of St. Giles, Camberwell* v. *Weller* (Law Rep. 6 Q. B. 168, n.) and *Sheffield* v. *Fulham Board* (1 Ex. D. 395) approved and followed; *Sawyer* v. *Paddington Vestry* (Law Rep. 6 Q. B. 164) dissented from.—By the Queen's Bench Division (Pollock, B., and Manisty, J.), the principle of the decision in *Plumstead Board of Works* v. *British Land Company* (Law Rep. 10 Q. B. 203) applies to the case of making a sewer as well as to the case of paving a road. HAMPSTEAD VESTRY *v.* COTTON - - - - **C. A. 475**

3. —— *Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 6, 54—*Vestryman—Qualification—Rating — Assessment—Occupation —Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 3—*Agreement by Owner with Overseers to pay Rates instead of Occupiers.*] An agreement by the owner of small tenements with the overseers of the parish to pay the poor-rates instead of the occupiers, his tenants (made under the Poor Rate Assessment and Collection Act, 1869, s. 3), does not render him a "person rated or assessed to the relief of the poor" within the meaning of s. 6 of the Metropolis Management Act, 1855, and does not qualify him to act as a member of a vestry constituted under the latter statute; and if he acts as a member, he will be liable to the penalty imposed by s. 54.—*Quære*, whether in order to be capable of acting or being elected as a vestryman under s. 6 of the Metropolis Management Act, 1855, a person must be rated and assessed in respect of the same hereditaments of which he is occupier.—Judgment of Lopes, J. (15 Q. B. D. 82), affirmed. MOGG *v.* CLARK - - - - - **C. A. 79**

MINE—*Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 51—*General Rules*, *s.* 51, *sub-s.* 8, *f.* 2—*Compliance with, when reasonably practicable—Use of Gunpowder—Mine or Part of the Mine where it is used—Absence of Persons ordinarily employed in Mine.*] The Coal Mines Regulation Act, 1872, by s. 51 enacts that certain general rules shall be observed so far as is reasonably practicable, and among them that gunpowder or other explosive or inflammable substance shall not be used in the mine underground, during three months after any inflammable gas has been found in any such mine, if the inflammable gas issued so freely that it shewed a blue cap on the flame of the safety lamp, except when the persons ordinarily employed in the mine are out of the mine, "or out of the part of the mine where it is used":—*Held*, that the expression "reasonably practicable" did not relate to the carrying on of the mine as a profitable concern, but to physical or engineering difficulties in the way of carrying out the rules, and—*Held*, also, that the expression, "part of the mine," did not mean the neighbourhood where the gunpowder would be used, but such a part of the mine as could be treated under the statute as a separate mine. WALES *v.* THOMAS - - - **340**

MISTAKE—Payment under mistake of law—Right to recover - - - **308**
See BANKRUPTCY. 11.

MONEY PAID—Right to recover payment under mistake of law - - - **308**
See BANKRUPTCY. 11.

MORTGAGE — Postponement of charge at request of mortgagor - - **305**
See BANKRUPTCY. 8.

MUNICIPAL CORPORATION—*Election—Illegal Practice—Application for Relief, when entertained —Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 *Vict. c.* 70), *s.* 20.] Where a candidate at a municipal election applied, under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, for relief against the consequences of an illegal practice, and it appeared that the applicant had been elected, and that a petition had been presented and was pending against his election, the Court refused to entertain his application for relief, which was ordered to stand over until after the trial of the election petition. EX PARTE WILKS [114

2. —— *Election—Municipal Elections (Cor-*

MUNICIPAL CORPORATION—*continued.*

rupt and Illegal Practices) Act, 1884 (47 & 48 *Vict. c.* 70), *s.* 14—*Printing or causing to be printed Bills or Placards without the Name and Address of the Printer, &c.—Evidence of Agency—Joint Conviction for two Offences.*] Upon an information against the appellant under s. 14 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, it was proved that the appellant was a candidate for a seat in the local board of Willesden; that the respondent received from his own servant at his residence a printed address and letter having reference to the election, and purporting to be signed by the appellant, but without the printer's name and address thereon; that this document was printed for publication by instructions conveyed to the printer in a letter from the appellant's brother, who resided with him; and that the printer had debited the appellant with the cost of printing, but had not been paid:—*Held*, no evidence that the appellant "printed or caused to be printed" the document in question, within s. 14.—Placards or posters (also without the printer's name or address), printed by the instructions of one Ellis (who was advertised in a local newspaper as the chairman of a committee for promoting the election of the appellant, and who sent the "copy" to the printer), were proved to have been posted about the district at Ellis's expense:—Whether this was evidence of the printing and posting by an agent of the appellant, *Quære*?—But, the justices having convicted the appellant in one penalty for both the alleged offences, and the conviction being bad as to one of them,—*Held*, that it was bad altogether. BETTESWORTH *v.* ALLINGHAM - - 44

—— By-law—Music in street—Sunday - 708
See BY-LAW.

NEWSPAPER—Liability of vendor—Libel 354
See DEFAMATION.

NEW STREET—Old turnpike road - - 475
See METROPOLIS MANAGEMENT ACTS. 2.

NON-JOINDER—Addition of party as plaintiff—Order XVI., rr. 2, 11 - - - 678
See PRACTICE. 15.

NUISANCE—Order to abate—Local Government Acts—Specification of works required
See LOCAL GOVERNMENT ACTS. [34

OXFORD — University — Chancellor's Court — Jurisdiction—Plaintiff resident out of city of Oxford - - - - 761
See UNIVERSITY.

OWNER—House — New street — Sewering and paving - - - - - 379
See METROPOLIS MANAGEMENT ACTS.

—— New street—Sewering and paving—Rent collector - - - - - 403
See LOCAL IMPROVEMENT ACT.

PARLIAMENT — *Borough Vote—Declaration as to Misdescription—Reception of as Evidence—Time for sending—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 24—*Redistribution of Seats Act*, 1885 (48 & 49 *Vict. c.* 23), *s.* 30 (*a*).] A declaration by a person entered on a list of voters as to a misdescription in such list cannot be received as evidence by a revising barrister, unless it has been sent within the statutory time to the town clerk or clerk of the peace. DAKING *v.* FRASER - - - 252

2. —— *Borough Vote—Occupation Franchise—Inhabitancy of Dwelling-house by virtue of Service—Soldier occupying Quarters—Absence on Duty during Part of Qualifying Period—Representation of the People Act*, 1884 (48 *Vict. c.* 3), *s.* 3.] A non-commissioned officer in the service of the Crown claimed the parliamentary franchise as the inhabitant occupier of a dwelling-house in respect of rooms occupied by him as his quarters in barracks.—He had inhabited the rooms, which consisted of a bedroom and sitting-room, during the qualifying period, subject, however, to certain regulations and powers of superior officers incident to military service, such, for instance, as the power of entry by the commanding officer at any time, and by other superior officers for the purpose of preserving order, and by certain officers at stated times for the purpose of inspection of the rooms, the power of the commanding officer to forbid any person to enter or leave the barracks at any time, and the obligation to be in his quarters at a stated hour every evening. The Crown supplied certain necessary articles of furniture for the rooms, the rest of the furniture being the claimant's own. The rooms formed part of one of the blocks of buildings situate within the barrack inclosure, the remaining rooms in the block being occupied by other non-commissioned officers, some of whom were superior in rank to the claimant, and the senior of whom was bound to preserve order in the block, and would be entitled to enter the claimant's rooms for that purpose. The colonel commanding lived in a house situate within the walls of the barracks:—*Held*, that the claimant was entitled to the franchise under the 3rd section of the Representation of the People Act, 1884, on the ground that he had inhabited a dwelling-house within the meaning of that section, and that no person under whom he served had inhabited such dwelling-house.—In two other cases where votes were claimed by persons in military service, the facts with regard to the occupation of the quarters were similar, with the exception that the claimants, non-commissioned officers, had been absent for twenty-one days during the qualifying period from their quarters on duty elsewhere, and could not return without leave, but during such absence, in one case the claimant's wife and family, and in the other his furniture, remained in the quarters which were retained for him:—*Held*, that, it not sufficiently appearing in those cases that there had been any constructive inhabitancy of the rooms by the claimants during the twenty-one days when they were in fact absent, they were not qualified under the above-mentioned section. ATKINSON *v.* COLLARD - - - - - - 254

3. —— *Borough Vote—Registration of Voters—Description of Qualification—Houses in Succession—Power to amend*—41 & 42 *Vict. c.* 26, *ss.* 24, 28.] Sub-s. 13 of s. 28 of 41 & 42 Vict. c. 26, limits the general power of amendment given to the revising barrister by sub-s. 1 of that section,

PARLIAMENT—*continued.*

except where the voter has made a declaration under s. 24 of that Act in order to correct an erroneous description of his qualification on the list: and, therefore, where no such declaration has been made, the revising barrister has no power to make an amendment which would change the description of the qualification as it appears in the list, as by stating the qualification to be in respect of the occupation of two houses in succession during the qualifying period, when it appears in the list to be in respect of the occupation of one of such houses only.—*Bartlett* v. *Gibbs* (5 M. & G. 81) approved and acted on.—*Porrett* v. *Lord* (5 C. P. D. 65) dissented from. FOSKETT *v.* KAUFMAN - - - - C. A. 279

4. —— *Borough Vote—Representation of the People Act*, 1884 (48 *Vict. c.* 3), *s.* 3—*Inhabitant Occupier of Dwelling-house—Industrial Trainer in Workhouse—Right of Voting—Master of Workhouse—Use of Board Room by Guardians.*] The appellant was an industrial trainer in the employment of poor law guardians, and as part of his salary was allowed to have the exclusive occupation of a sitting-room and bed-room in the main building of the workhouse. The guardians reserved another room in the workhouse which they used as a board-room; the master of the workhouse, whom they employed, resided in other rooms in the building. The appellant could not stay out of his rooms after 9 p.m. without the permission of the master; the master, however, had no power to suspend or dismiss him if he did so, but could only report the matter to the guardians: —*Held*, that the appellant was an inhabitant occupier of a dwelling-house by virtue of his employment, within 48 Vict. c. 3, s. 3—for the workhouse was not in the circumstances inhabited by the guardians, and he did not serve under the master of the workhouse so as to disqualify him from voting. ADAMS *v.* FORD - - 239

5. —— *Borough Vote—Tenure of House by Service—Separate Bedroom—Joint User of Sitting-room — Representation of the People Act*, 1884 (48 *Vict. c.* 3), *s.* 3—*Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 2, *Part II., Form A.*] A shop assistant occupied exclusively, by virtue of his employment, a furnished bedroom in a dwelling-house belonging to his employers. The house contained other bedrooms similarly inhabited by other persons in the same employment, and a dining-room in which the inmates of the house took their meals in common, which were provided for them by their employers. The inmates had no keys of their bedrooms. The employers did not inhabit the house, but they had a resident caretaker who exercised general control over it, and a resident servant who was not under the order of the inmates, and by whom the domestic service requisite for the rooms was done:—*Held*, that there was sufficient inhabitancy of a dwelling-house, by virtue of service, within s. 3 of the Representation of the People Act, 1884, to confer the franchise, and that this was not affected by the joint user of another part of the house. STRIBLING *v.* HALSE - - - - 246

6. —— *Borough Vote—Universities of Oxford and Cambridge—Occupation of College Rooms—Regulations prohibiting Residence during Vacations—Registration Act*, 1885 (48 *Vict. c.* 15)—*Reform Act* (2 & 3 *Wm.* 4, *c.* 45), *s.* 78—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-s.* 2.] Students in the universities of Oxford and Cambridge, who occupy rooms in their colleges under regulations which do not allow them to reside in or visit their rooms during the vacations without the express permission of the college authorities, are not entitled under the Representation of the People Act, 1867, to be registered as voters in respect of such occupation. TANNER *v.* CARTER - - - - 231

7. —— *County Vote—Claims—Late Publication by Overseer—Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 2, *Part* 2.] An overseer received claims in due time from occupiers and from lodgers not already on the register, but published a list of them some days after the time specified in the second Schedule, part 2, of the Registration Act, 1885:—*Held*, that this did not invalidate the lists, and that the revising barrister was right in accepting and revising them. WELLS *v.* STANFORTH - - - 244

8. —— *County Vote—Disqualification — Receipt of Parochial Relief or other Alms—2 Wm.* 4, *c.* 45, *s.* 36—*Employment by Taskmaster of the Guardians of the Poor—Stonebreaking.*] The appellant having applied to the poor law guardians for work was employed by them by way of relief in breaking stones and paid out of the parochial funds, the amount paid to him being much greater than the value of his work to the guardians:—*Held*, that he had received "parochial relief or other alms" within 2 Wm. 4, c. 45, s. 36, so as to disqualify him from voting. MAGARRILL *v.* OVERSEERS OF WHITEHAVEN - 242

9. —— *County Vote — Equitable Freehold—Lands vested in Trustees for Purposes of a voluntary Association—Stock Exchange.*] Where an association of persons has purchased land for the purposes of an undertaking, and vested it by deed in trustees and managers upon such terms and conditions that, while the trusts of such deed subsist, the individual members of the association are respectively entitled only to a share in the net profits of the undertaking carried on upon the land, such members have not an equitable freehold in the land so as to acquire the county franchise, although the association is not incorporated or registered as a joint stock company, but is a mere voluntary association without statutory powers or restrictions.—*Baxter* v. *Brown* (7 M. & G. 198) discussed and distinguished. WATSON *v.* BLACK - - - - 270

10. —— *County Vote—Registration of Voters —Description of Qualification—Power to amend —"Tenement"—41 & 42 Vict. c.* 26, *s.* 28.] In the overseers' list of occupiers entitled to vote for a division of a county, the "nature of the qualification" of a voter was described as "tenement and garden," and the "description of the qualifying property" was stated to be "part bailiff's tenement." An objection was taken that the nature of the qualification was wrongly described. It was proved before the revising barrister that the voter was an inhabitant occupier of a part of a dwelling house, and the barrister amended the list by striking out the words "and garden," and

PARLIAMENT—*continued.*
inserting the word "dwelling-house" before "tenement":—*Held*, by the Court of Appeal, that, looking at the whole entry, the words "tenement and garden" might fairly be read as intended to be used in the vulgar but inaccurate sense of a small house, and to describe the qualification arising from the occupation of a dwelling-house, and consequently that the barrister had power to amend the entry as he had done for the purpose of more accurately defining the qualification.—But *held*, that the proper alteration would have been, to strike out the words "tenement and garden," and substitute the word "dwelling-house." DASHWOOD *v.* AYLES - **C. A. 295**

11. —— *County Vote—Registration of Voters—Description of Qualification—Power to amend—"Tenement"*—41 & 42 *Vict. c.* 26, *s.* 28.] In the overseers' list of occupiers entitled to vote for a division of a county, the "nature of the qualification" of a voter was described as "tenement and garden," and the "description of the qualifying property" was stated to be "School Yard." The "nature of the qualification" of thirty-three other voters was described in the same way. As to two of the thirty-three the "description of the qualifying property" was stated to be "School Yard," as to five, "Cat Lane," as to three, "High Street," as to five, "Bridge." In each case the voter occupied a dwelling-house and garden of a less annual value than 10*l.*:—*Held*, by the Court of Appeal, that, looking at all the cases together, the revising barrister might fairly consider that the words "tenement and garden" were intended to describe a dwelling-house, and that he had power to amend the description by striking out the words "and garden" and inserting the word "dwelling-house" before "tenement," though it would have been better to strike out "tenement" also. MINIFIE *v.* BANGER - - **C. A. 302**

12. —— *Election—Ballot Paper—Absence of Official Mark—Validity—Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *ss.* 2, 4; *rr.* 34, 36.] A ballot paper which conforms in other respects to the requirements of the Ballot Act, 1872 (35 & 36 Vict. c. 33), is not void because it has not on the face of it the official mark directed by s. 2 of that Act to be marked on both sides of the ballot paper.—*Pickering* v. *James* (Law Rep. 8 C. P. 489) considered. IN RE THORNBURY DIVISION OF GLOUCESTERSHIRE ELECTION PETITION. ACKERS *v.* HOWARD - - - - - **739**

PARSON — Rector's rate — Rateability to poor rate - - - - - **7**
See POOR RATE. 2.

PARTICULARS—Slander—Names of persons to whom slander uttered - - **656**
See PRACTICE. 14.

PARTIES—Non-joinder of—Addition of party as plaintiff by consent—Order XVI., rr. 2, 11 - - - - - **678**
See PRACTICE. 15.

PARTNERSHIP — Contribution — Joint adventure - - - - - **455**
See CONTRIBUTION.

—— Embezzlement by member—Association for purposes unconnected with gain **137**
See CRIMINAL LAW. 4.

PARTNERSHIP—*continued.*
—— Writ of summons—Service—Foreign firm—Member coming within jurisdiction **792**
See PRACTICE. 23.

PAUPER—Person suing in formâ pauperis—Right to be heard in person - **562**
See PRACTICE. 16.

PENALTY—Action for—Interrogatories - **507**
See PRACTICE. 8.

—— Contract with local authority by officer or servant—Right of action - - **446**
See LOCAL GOVERNMENT ACTS. 2.

—— Imprisonment for non-payment—Summary conviction—Hard labour - - **647**
See JUSTICES.

PETTY BAG OFFICE—Writ of prohibition—Jurisdiction of judge in chambers - **187**
See PRACTICE. 21.

PLEADING—Amendment—Prejudice to plaintiff
See PRACTICE. 17, 18. **[178—556**

POOR LAW—*Settlement by Residence—Break of Residence—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.] The pauper was employed from November, 1873, to July, 1878, as an indoor resident nurse at an infirmary in M. She was under the authority of the lady superintendent of nurses in the infirmary, and was bound by the terms of her agreement to undertake any duties that might be assigned to her either as a hospital or a private nurse. For five months in 1876, and for three months in 1877, she acted, under the orders of the lady superintendent, as a nurse at a branch establishment out of M., returning to the infirmary as soon as her duties ceased at the branch establishment. During this absence her wages were paid from the head institution at M., and the greater part of her effects during the first period of absence was left behind her in her box in the dormitory at the infirmary, to which place she went from time to time for change of clothing as required:—*Held*, that the absence of the pauper for the two periods did not amount to a break of residence, and that she had gained a settlement in M. by three years' residence within the meaning of 39 & 40 Vict. c. 61, s. 34. OVERSEERS OF MANCHESTER *v.* GUARDIANS OF ORMSKIRK - **723**

2. —— *Settlement by Residence—Term of Three Years—Irremoveability — Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.] In order that a settlement by residence may be acquired under s. 34 of the Divided Parishes Act, 1876, there must have been a residence for three consecutive years under such conditions in each of such years as would have created a status of irremoveability. GUARDIANS OF DORCHESTER UNION *v.* GUARDIANS OF WEYMOUTH UNION - - - **31**

POOR-RATE—*Harbour Duties—Soil of Harbour not belonging to Commissioners—Duty comprising Harbour Duty and Additional Duty for use of Wet Dock — Rateability.*] Commissioners were appointed by a local Act of Parliament for the improvement of a harbour, with power to impose tonnage dues upon all ships using the harbour, and other dues called shore dues on goods shipped from or landed on the quays. The soil of the harbour did not belong to the commissioners, but that of the quays was vested in them, and they

POOR-RATE—*continued.*
were accordingly rated to the poor-rate in respect of the shore dues, but not in respect of the tonnage dues. By a subsequent Act the commissioners were empowered to construct a wet dock, and fresh dues were substituted for those previously authorized, the shore dues on goods being much the same as those which previously existed, except that additional dues were payable on completion of the wet dock on goods loaded or discharged in the dock, or exported or imported in vessels of a tonnage of 100 tons or upwards, and new tonnage dues for vessels entering or leaving the harbour; those for vessels under 100 tons being practically the same as those previously imposed, and those for vessels above 100 tons being higher, and it was also provided that for every vessel entering the wet dock there should be an additional tonnage duty:—*Held*, that in assessing the commissioners to the poor-rate in respect of the dock, the additional dues paid by ships entering the dock ought only to be taken into account, and not the harbour duty payable by such vessels exclusive of the additional dues.—*Reg.* v. *Kingston-upon-Hull Docks* (7 Q. B. 2) distinguished. THE QUEEN *v.* BERWICK ASSESSMENT COMMITTEE 493

2. —— *Parson in respect of what rateable—Rector's Rate*—43 *Eliz. c.* 2—3 *&* 4 *Vict. c.* 89.] Under the provisions of a local Act the rector of a parish received annually the proceeds of a rate called the rector's rate made upon the owners of houses, shops, warehouses, cellars and outhouses:—*Held*, that the rector was not rateable to the poor-rate in respect of the amount so received, the same not being in lieu of tithes. THE QUEEN *v.* CHRISTOPHERSON - - - - C. A. 7

3. —— *Purchase of Premises by Postmaster-General—Rateable Value at Date of Purchase—Telegraph Act*, 1868 (31 *&* 32 *Vict. s.* 110), *s.* 22.] The Telegraph Act, 1868, empowers the Postmaster-General to purchase, for the purposes of the Act, the undertaking (including land and property) of any telegraph company, and s. 22 provides that all land, property and undertakings so purchased shall be assessable and rateable to parochial rates at sums not exceeding the rateable value at which such land, property and undertakings were properly assessed at the time of such purchase. In 1870 the Postmaster-General purchased the undertaking of a telegraph company, including a house held by the company under a lease for twenty-one years from September, 1867. At the time of the purchase a portion of the house was subject to an underlease granted by the company to H. for the remainder of the term less one day, and containing a covenant by the company to pay all parochial rates. The Postmaster-General occupied and used, for telegraphic purposes only, the portion of the house not comprised in the underlease until the year 1878, when he demised that portion to others, and thenceforth no part of the house was occupied or used for telegraphic purposes. The rateable annual value at which the portion comprised in the underlease could properly have been assessed as a separate tenement at the time of the purchase was 108*l.* In 1880 the assessment committee of the district separately assessed that portion in respect of parochial rates at the rateable annual value of 334*l.*:—

POOR-RATE—*continued.*
Held, that s. 22 applied notwithstanding that all use of the house for telegraph purposes had ceased, and therefore that the occupier of the premises comprised in the underlease was not liable to be assessed in any sum exceeding the rateable value at which these premises could have been properly assessed at the time of the purchase. OVERSEERS OF ST. GABRIEL, FENCHURCH *v.* WILLIAMS - 649

4. —— *Waterworks—Assessment—Works in Excess of existing Requirements—Rateable Value.*] A waterworks company had works extending over many parishes. All the works were in use for the supply of their customers, but they were in excess of the existing requirements of the company, and were created for and adapted to an increased supply in future years. In the calculation by which the rateable value of the mains and service pipes in one of the parishes supplied was to be arrived at:—*Held*, that the whole of the works being used for the purpose of distributing water as a source of profit, the whole of the capital expenditure must be taken into account, and not merely so much as would have sufficed to provide the existing supply:—*Held*, also, that the deduction to be made in respect of the rates which the hypothetical tenant would have to pay, is the amount of the rates that would be payable on the sum at which the works ought to be assessed, and not necessarily the rates based on the existing valuation list. THE QUEEN *v.* SOUTH STAFFORDSHIRE WATERWORKS COMPANY - C. A. 359

5. —— *Waterworks—Water-rates in aid of Water-Rents—Principle of Assessment to Poor-rate—Deduction for Repair of Property*—39 *&* 40 *Vict. c. clxxxv., s.* 106.] By their special Act 39 *&* 40 Vict. c. clxxxv., the appellants, a local board, were empowered to make a public water-rate, but s. 106 provided that they should not levy any higher public water-rate than might be required to discharge so much of the expenses of maintaining the waterworks as the amount of water-rents and other payments for a supply of water should not be sufficient to discharge:—*Held*, that in assessing the appellants to the poor-rate in respect of their reservoirs, pipes, and works, the amount collected by means of a water-rate ought to be taken into account; that a certain percentage on the total cost of the property might be allowed for wear and tear as the "probable average annual cost of repairs" within the Parochial Assessment Act (6 *&* 7 Will. 4, c. 96), s. 1; and that the adequate remuneration to a contractor for erecting the works was not the true measure of the net rateable value of the premises. DEWSBURY AND HECKMONDWIKE WATERWORKS BOARD *v.* ASSESSMENT COMMITTEE OF PENISTONE UNION 585

—— Qualification of vestryman—Assessment—Occupation - - - - 79
See METROPOLIS MANAGEMENTS ACTS. 3.

POSTMASTER-GENERAL—Purchase of premises—Rateable value - - - 649
See POOR-RATE. 3.

PRACTICE—*Appeal, Court of—Jurisdiction—Criminal Matter, Judgment in*—19 *&* 20 *Vict. c.* 16—*Judicature Act*, 1873, *s.* 47.] No appeal lies to the Court of Appeal from the refusal of the Queen's Bench Division to grant a certiorari to

PRACTICE—*continued.*

remove an indictment to the Central Criminal Court under 19 & 20 Vict. c. 16. THE QUEEN *v.* RUDGE - - - - - **C. A. 459**

2. —— *Rules of Supreme Court, Order LVIII., rr.* 1, 15—*Appeal—Time for appealing—"Bringing" of Appeal.*] At the trial of an action on the 23rd of June, 1884, judgment of nonsuit was given. The judgment was entered on the 2nd of July, 1884. The plaintiffs served a notice of appeal on the 22nd of June, 1885; the appeal was not entered till the 4th of July, 1885:—*Held*, that the appeal was "brought" when the notice of appeal was served on the defendant, and that, as this was done within a year from the pronouncing of the judgment, the appeal was in time. CHRISTOPHER *v.* CROLL - **C. A. 66**

3. —— *Security for Costs—Pauper or Insolvent Plaintiff—Interpleader Issue upon Application by a Defendant in an Action — Receiving Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52.] The fact that a plaintiff is insolvent, and that there is a receiver of his assets, is not necessarily a ground for requiring him to give security for costs.—*Malcolm* v. *Hodgkinson* (Law Rep. 8 Q. B. 209) commented on.—A receiving order, made under the Bankruptcy Act, 1883, does not divest the debtor of his property; and what he recovers as plaintiff in an action is his property both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors, if he does not pay or compound with them. Therefore a debtor, against whom a receiving order has been made, ought not merely on that ground to be ordered to give security for the costs of any action in which he may be the plaintiff.—In considering whether parties to an interpleader issue ought to be required to give security for costs, the rules applicable to ordinary litigants ought to be observed, even although the interpleader proceedings have not been instituted by a sheriff; and in applying those rules the question, whether a party to an interpleader issue is to be treated as a plaintiff or as a defendant, must be decided by the real merits of the case, and not by the mere form of the issue itself. —The defendant entered into a contract with R., for the execution of certain repairs to her residence. R. employed the plaintiff to do the work. Afterwards a petition under the Bankruptcy Act, 1883, was presented against R., and a receiving order was made. The plaintiff thereupon commenced the present action to recover the cost of the work, and the defendant having interpleaded, it was ordered that the amount in dispute should be paid into court, and an interpleader issue was directed in which R. should be the plaintiff and the plaintiff in the action the defendant. The creditors of R. accepted a composition in satisfaction of their claims, and he was not adjudged a bankrupt. The Queen's Bench Division having ordered that R. should give security for the costs of the interpleader issue:—*Held*, that the order was wrongly made, and must be set aside. RHODES *v.* DAWSON - - - **C. A. 548**

4. —— *Costs—Solicitor—Taxation—Lapse of Twelve Months since delivery of Bill—"Special Circumstances"—6 & 7 Vict. c.* 73, *s.* 37.] The "special circumstances" which, under 6 & 7 Vict. c. 73, s. 37, allow a solicitor's bill of costs to be referred for taxation, although twelve months have elapsed since it was delivered to the client, are not merely pressure and overcharge, or overcharge amounting to fraud. A judge has a discretion in ordering the bill of costs to be taxed, if it contains items unreasonably large, or charges requiring explanation, or gross blunders.—*Semble*, that the same principle ought to be applied to the taxation of a bill of costs which has been paid.—*In re Boycott* (29 Ch. D. 571) commented on.—Bills of costs delivered by a solicitor contained the following charges: 735*l.* for the costs of a reference, lasting six days: 83*l.* for witnesses' expenses, none of which had been paid by the solicitor, but nearly the whole of which had been paid by the client: and 71*l.* for shorthand notes of the proceedings at a reference where no professional shorthand writer had been employed, but the clerk to the solicitor had taken the notes, and it did not appear that the solicitor had given his clerk any part of the 71*l.* charged. More than twelve months had elapsed since the bills were delivered:—*Held*, that these charges constituted "special circumstances" within the meaning of 6 & 7 Vict. c. 73, s. 37, which justified a judge in referring the bill for taxation. IN RE NORMAN **[C. A. 673**

5. —— *Costs—Taxation—Fees to Counsel—Refreshers on Argument—Order LXV., r.* 27, *sub-rr.* 30 *and* 48.] The power of a taxing master to allow refreshers to counsel is not limited to the cases specified in Order LXV., rule 27, sub-rule 48, and such refreshers can, therefore, in the discretion of the taxing-master, be allowed on an argument before the Court of Appeal. SVENDSEN *v.* WALLACE - - - - - **27**

6. —— *County Court—Remission of Action to — Counter-claim for Unliquidated Damages — 19 & 20 Vict. c.* 108, *s.* 26.] An action, although for a sum not exceeding 50*l.*, cannot be remitted under 19 & 20 Vict. c. 108, s. 26, to the county court for trial if there is a counter-claim for unliquidated damages. MACKAY *v.* BANNISTER **174**

7. —— *Discovery of Documents from co-Defendant——Rules of Court*, 1883, *Order XXXI., r.* 12.] The plaintiff made in the same action claims against two defendants, the claim against one defendant being in respect of the alleged breach of a certain stipulation of a contract, and the claim against the other defendant being an alternative claim for negligence by him as agent in effecting a contract without such stipulation contrary to instructions: — *Held*, that one of such defendants could not obtain discovery of documents in the action from the other, Order XXXI., r. 12, only providing for discovery between opposite parties. BROWN *v.* WATKINS **125**

8. —— *Discovery—Interrogatories—Penalties, Action for, by Common Informer—Order XXXI., r.* 1.] The general rule is that in an action for penalties by a common informer leave will not be given to the plaintiff to administer interrogatories. MARTIN *v.* TREACHER - - **C. A. 507**

9. —— *Discovery—Production of Documents for Inspection—Documents in which Parties have a common Interest — Security for Costs — Order XXXI., rr.* 25, 26.] Order made that the plaintiff

PRACTICE—*continued.*

in an action of contract should have inspection of the written contract which was in the defendant's possession without giving the security for costs required by Order XXXI., rr. 25, 26.—The provisions of Order XXXI., rr. 25, 26, with regard to security for the costs of discovery do not apply to an application for production of a document in which both parties to the action have a common interest. BROWN *v.* LIELL - - - **229**

10. —— *Inspection of Documents—Privilege—Copies made for Purposes of Litigation.*] A correspondence had taken place between the defendant in an action and persons other than the plaintiff which was material to the questions at issue in the action. The defendant had not preserved the letters received by him or copies of the letters written by him in the course of such correspondence, but after action brought his solicitor, for the purposes of the defence to the action, procured through such third persons copies of the letters so written and received:—*Held*, that such copies were not privileged against inspection by the plaintiff. CHADWICK *v.* BOWMAN - **561**

11. —— *Interpleader—Power to interplead as to part only of a single Claim*—1 *&* 2 *Wm.* 4, *c.* 58, *s.* 1—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6—*Order LVII., rr.* 1, 4.] A debtor against whom an action has been brought, and who has had notice of assignment of the debt, may interplead as to part only of the claim, and may dispute the residue. His application for relief may either be made in the action under Order LVII., rr. 1, 4, or by a separate proceeding under s. 25, sub-s. 6, of the Judicature Act, 1873.—If an interpleader order be made on a separate proceeding under s. 25, sub-s. 6, of the Judicature Act, 1873, the judge making the order has no power to stay the proceedings in an action already commenced against the debtor. READING *v.* SCHOOL BOARD FOR LONDON - - - - - **686**

12. —— *Interpleader—Summary Decision—Appeal from Master to Judge by leave—Order LIV., r.* 12, *Order LVII., rr.* 8, 11—*Common Law Procedure Act*, 1860 (23 *&* 24 *Vict. c.* 126), *s.* 17.] Where a master summarily decides an interpleader matter under Order LVII., r. 8, and gives leave to appeal, a judge at chambers has jurisdiction to entertain such appeal by virtue of the provisions of Order LVII., r. 11. WEBB *v.* SHAW - **658**

13. —— *Liability—Damages—Detail—Order for trial of one Question before the other—Order XXXVI., r.* 8.] Where liability and also the amount of damages are disputed in an action, and the question as to the amount of damages is one of such detail or nature that it probably will be referred to some other tribunal than a jury, it is a proper exercise of discretion under Order XXXVI., r. 8, to order the question of liability to be tried, and the question of damages to be postponed until afterwards. SMITH *v.* HARGROVE [**183**

14. —— *Particulars—Slander—Names of Persons to whom Slander was uttered.*] In an action for slander the Court ordered the plaintiff, upon a summons taken out by the defendant before delivery of the defence, to give particulars of the names of the persons to whom the alleged slander was uttered. ROSELLE *v.* BUCHANAN - **656**

PRACTICE—*continued.*

15. —— *Parties, Non-joinder of—Addition of Party as Plaintiff—Consent—Order XVI., rr.* 2, 11.] A person cannot be added as a plaintiff without his consent in writing, even although he be indemnified against costs. TRYON *v.* NATIONAL PROVIDENT INSTITUTION - - - **678**

16. —— *Person suing in formâ pauperis—Right to be heard in person—Order XVI., rr.* 22–30.] A person who has been admitted to sue as a pauper, but to whom no counsel has been assigned, is entitled to be heard in person. TUCKER *v.* COLLINSON - - - - **C. A. 562**

17. —— *Pleading—Amendment of Defence—Prejudice to Plaintiff.*] A tramway company were sued for damages caused by their negligence in allowing their tramway to be in an unsafe and defective condition. By their defence they denied negligence. More than six months after the delivery of the defence the defendants applied for an order to amend it, by adding an allegation that under an agreement the liability to maintain the roadway had previously to the cause of action been transferred to the local authority of the district:—*Held*, inasmuch as the six months within which, by statute, notice of action must be given to the local authority had elapsed, and the remedy against them was lost to the plaintiff, his position would be prejudicially affected by the proposed amendment, and it therefore ought not to be allowed. STEWARD *v.* NORTH METROPOLITAN TRAMWAYS COMPANY - - - - **178**

18. —— *Amendment of Pleadings—Prejudice to Plaintiff.*] The defendants, a tramway company, were sued in respect of injuries alleged to have been occasioned to the plaintiff through their not having maintained a road upon which their tramway ran in a safe and proper condition. Six months after the close of the pleadings the defendants applied for leave to amend their defence by setting up a contract under s. 29 of the Tramways Act, 1870, by which the liability to maintain the road was shifted from them to the vestry, the road authority of the district. Since the close of the pleadings the statutory period of limitation within which the plaintiff could have sued the vestry had elapsed:—*Held*, that the defendants ought not to be allowed to amend their defence, because the plaintiff could not be placed in the same position as if the defendants had pleaded correctly in the first instance. STEWARD *v.* NORTH METROPOLITAN TRAMWAYS COMPANY [**C. A. 556**

19. —— *Solicitor called as Witness, Professional Privilege of—Name of Client not Matter of Confidence—Parol Evidence, who Trustees of Settlement are, proveable by—Document, when Solicitor obliged to produce—Privilege that of the Client.*] Judgment having been signed against a married woman in an action, an inquiry was directed before a master whether she was possessed of any separate estate. The solicitor to the trustees of her marriage settlement, being subpœnaed by the judgment creditor upon the inquiry as a witness, and to produce documents, stated that the deed of settlement was in his possession as solicitor to the trustees, but refused to state the names of the trustees or produce the deed on the ground of professional privilege:—

PRACTICE—*continued.*

Held, that he must state the names of the trustees and produce the deed. BURSILL *v.* TANNER [C. A. 1

20. —— *Trial—Evidence—Hostile Witness—Discretion of Judge to allow Witness to be treated as hostile—Jurisdiction of Court to review Judge's Discretion—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 22.] At the trial of an action the defendant's counsel, in order to shew that a witness called by him was hostile, and to obtain leave to treat him as such under s. 22 of the Common Law Procedure Act, 1854, asked the judge to look at an affidavit made by the witness in a former action. The judge, being of opinion that there had been nothing in the witness's demeanor, or in the way he had given his evidence, to shew that he was hostile, refused to look at the affidavit:—*Held*, on motion for a new trial, that the discretion given to the judge under s. 22 of the Common Law Procedure Act, 1854, was absolute, and the Court had no jurisdiction to review his decision. RICE *v.* HOWARD - 681

21. —— *Writ of Prohibition—Application to set aside—Judge at Chambers, Jurisdiction of—Judicature Act*, 1873, *ss.* 23, 39—*Order LXXII., r.* 2.] A judge sitting at chambers has jurisdiction to set aside a writ of prohibition issued out of the Petty Bag Office.—*Salm Kyrburg* v. *Posnanski* (13 Q. B. D. 218) followed. AMSTELL *v.* LESSER - - - - - - 187

22. —— *Writ of Summons—Service out of the Jurisdiction—Certificate in lieu of Affidavit of Service—Foreign Law.*] Under Order XIII. r. 2—which requires that before taking proceedings upon default of appearance to a writ of summons, the plaintiff shall file an affidavit of service or notice in lieu of service, as the case may be—the Court, where notice of a writ is served out of the jurisdiction, has no power to allow a certificate of service to be filed in lieu of an affidavit, even where it appears that by the foreign law the process server cannot make an affidavit as prescribed by r. 2. FORD *v.* MIESCKE - - - - 57

23. —— *Writ of Summons—Service—Defendants sued in the Name of Partnership Firm—Foreign Partnership—Service on one Member of Foreign Firm within Jurisdiction—Rules of the Supreme Court*, 1883, *Order IX., r.* 6—*Appendix A., Part* 1, *Forms* 5–8.] The defendants, who were a foreign partnership carrying on business out of the jurisdiction, were sued in the name of their firm. One member of the firm happening to be within the jurisdiction was served with the writ, which was the ordinary eight-day writ:—*Held*, that such service was good under Order IX., r. 6, which provides that, where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there. POLLEXFEN *v.* SIBSON - - - 792

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RATEABILITY—"*Public Charity*"—*House used for Purposes of—Railway Servants' Orphanage—Exemption from District Rates* — 6 *Geo.* 4, *c. cxxxii., s. ciii.*] By a Local Improvement Act, 6 Geo. 4, c. cxxxii., s. ciii., the commissioners of a town were authorized to make district rates for defraying the expenses of the Act, provided that none of the rates or assessments which should be made by virtue of this Act should be laid upon or in respect of "any houses or buildings used and occupied exclusively for the purposes of public charity":—*Held*, that an orphanage founded and used for the purpose of boarding, lodging, clothing, and educating the children of deceased railway servants, and supported partly by subscriptions from railway servants but mainly by donations from the public, was open to such an extensive class of the community of the kingdom that the premises were used and occupied exclusively for the purposes of "public charity," within the proviso of the Act, and therefore exempt from rateability under it. HALL *v.* DERBY SANITARY AUTHORITY - - - - - 163

RATS—Damage—Carrier by sea—"Dangers and accidents of the seas" - - - 629
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RECTOR—Rate under local Act—Rateability to poor-rate - - - - - 7
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REGISTRATION—Parliamentary franchise—Description of qualification — Power to amend - - - - 302
See PARLIAMENT. 11.

REMAINDER—Executory devise—Will—Trustees—Power of sale - - - 85
See WILL.

REVENUE—*Probate Duty—Lunatic—Accumulations of Personal Estate—Investment in Realty—Conversion.*] In certain instances where in a Court of Equity land is considered to be of the nature of personal, and not of real, estate, it may for the purposes of probate duty be treated and dealt with as part of the estate and effects of the deceased owner, in respect whereof administration is granted to his personal representatives, and whereupon probate duty is payable: but land can be so treated and dealt with only where it is part of the assets of a partnership, or where the deceased owner has contracted to sell it, or where it is subject to an imperative trust for sale to be executed independently of his consent, or where an order of a Court of competent jurisdiction has directed it to be sold, and has caused its direction to be carried out by inserting apt words of conveyancing in the necessary deeds and documents, the intended sale in each of the three last-mentioned instances having been such that it might have been carried out in the owner's lifetime; for where the sale either is independent upon the consent of the owner during his lifetime, or can be carried out only after his death, the land for the purposes of probate duty must be deemed to be of the nature of real, and not personal, estate: the state of matters and the rights existing at the moment of the owner's death must be considered and taken into account, in order to ascertain whether probate duty is payable.—The committees of a lunatic, acting under certain orders of the Lords Justices of Appeal sitting in Lunacy, invested the accumulations of his personal estate in the purchase of land. In pursuance of, and in conformity with, these orders, certain lands (the price for which was paid out of the accumulations of the lunatic's personal estate) were conveyed "unto and to the use of the" committees, "their heirs and assigns, for ever, upon trust for" the lunatic, "his executors, administrators, and assigns;" and certain powers of leasing and sale were given to the committees; and the deeds of conveyance contained a declaration that the lands thus bought should be considered as part of the personal estate of the lunatic, but they contained in terms no trust for sale:—*Held*, that the value of the lands thus bought was not part of the lunatic's personal estate and effects at his decease, and was not liable to probate duty as part of the estate and effects, in respect of which administration might be granted to his personal representatives.—Judgment of the Queen's Bench Division (14 Q. B. D. 895) reversed. ATTORNEY GENERAL *v.* MARQUIS OF AILESBURY - - - 408

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—— **Order XVI., rr. 2, 11** - - - 678
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—— Street—Apportionment of expenses—Premises fronting, adjoining or abutting 577
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SEWERS—*Commissioners of—Walls, Banks, and Defences against the Sea, Jurisdiction over—Evidence of Exercise of Jurisdiction—Property vesting in Commissioners—Land Drainage Act*, 1833 (3 & 4 *Wm.* 4, *c.* 22), *ss.* 10, 47.] Sect. 10 of the Land Drainage Act, 1833 (3 & 4 Wm. 4, c. 22), which declares that certain walls, banks, and other defences by the coasts of the sea and navigable and tidal rivers are within and subject to the jurisdiction of commissioners of sewers does not of itself vest such defences in the commis-

SEWERS—*continued.*
sioners, and in order to shew that any wall or other defence is vested in the commissioners, it must be proved that they have in fact exercised jurisdiction over it. WEST NORFOLK FARMERS' MANURE CO. *v.* ARCHDALE - - - - 754

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SHIP—*Charterparty—Bill of Lading—"Dangers and Accidents of the Seas"—Hole made by Rats—Damage by Sea-water—Absence of Negligence.*] Damage to goods on board a ship caused by sea-water passing through a hole made by rats,—without any evidence of negligence on the part of the master or crew,—is within the ordinary exception of "dangers and accidents of the seas" in a charterparty or bill of lading.—Rice was shipped under a charterparty and bills of lading which excepted "all and every dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind." In the course of the voyage a hole was made by rats in a pipe which conveyed sea-water to a bath in the ship, whereby the water escaped and damaged the cargo. All reasonable precautions had been taken to keep down the rats:—*Held*, that the damage was within the exception, and that the ship-owners were not responsible. PANDORF *v.* HAMILTON - 629

2. —— *Demurrage—Charterparty—Lay Days—Usual Place of Discharge—Custom to lighten Vessel at Entrance to Port before proceeding to Place of Discharge.*] By charterparty it was agreed that the plaintiffs' steamship should proceed to Cronstadt and load a cargo of wheat, and therewith proceed to a port in the English or Bristol Channel as ordered, "or so near thereto as she may safely get at all times of tide and always afloat and deliver the same. Eight running days, Sundays excepted, to be allowed the merchants, if the ship be not sooner dispatched, for loading and discharging the steamer, and ten days on demurrage if required over and above the laying days at 25*l.* per day." The steamer arrived at Cronstadt, occupied six running days in loading a cargo of 4325 quarters of wheat, and was ordered to Gloucester, Bristol Channel, for discharge. She arrived at Sharpness Dock in the Bristol Channel on the 13th of November. Sharpness Dock is within the port of Gloucester, and about seventeen miles from the basin within the city of Gloucester, where grain cargoes are usually discharged if the burthen of the ship will admit. The steamer was ready to commence the discharge of her cargo on the 13th, but could not get nearer to Gloucester than Sharpness, until part of her cargo was first discharged at Sharpness. On the 14th and 15th of November the consignees discharged into lighters 1585 quarters of the cargo, and then required the master to take the steamer through the canal to a place of discharge within the basin at Gloucester. The master proceeded, and arrived in the basin on the 17th. On the 18th the residue of the cargo was discharged and the vessel returned to Sharpness, where she arrived on the 19th. In an action for demurrage evidence was given of a custom of the port of Gloucester, according to which the usual place of discharging grain cargoes was at the basin within

SHIP—*continued.*
the city, and when vessels with grain cargoes destined for Gloucester were of too heavy a burthen to come up the canal they were lightened at Sharpness, and during the discharge at Sharpness of so much of the cargo as it was necessary to discharge in order to enable the vessel to proceed by the canal to Gloucester Basin the lay days counted, but the time occupied by coming up the canal to discharge at Gloucester Basin and by returning to Sharpness was not counted;—*Held*, first, that the custom was reasonable; secondly, that it was not inconsistent with the express provision in the charterparty as to "running days," and that the time occupied by the vessel in going from Sharpness to the basin and in returning to Sharpness ought to be excluded from the lay days, and the plaintiffs were entitled to one day's demurrage only.—*Brown* v. *Johnson* (10 M. & W. 331; 11 L. J. (Ex.) 373) discussed.—Judgment of Pollock, B. (14 Q. B. D. 516), affirmed. NIELSEN *v.* WAIT 67

3. —— *Docks—London and St. Katharine Docks, Regulation of Vessels in—27 & 28 Vict. c. clxxviii., ss.* 100 *and* 101—*10 & 11 Vict. c.* 27, *s.* 3—*Dumb Barge—"Vessel."*] A "dumb barge," a river craft which is simply propelled by means of oars, and having no rigging or other equipment, is not a "vessel" within the meaning of ss. 100 and 101 of the London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), notwithstanding the definition of the word "vessel" in the interpretation clause (s. 3) of the Harbours, Docks, and Piers Clauses Act, 1847, 10 Vict. c. 27, and consequently, the owner is not liable to a penalty for allowing her to remain in the docks regulated by the former Act without any person on board. HEDGES *v.* LONDON AND ST. KATHARINE DOCKS COMPANY - - - 597

4. —— *General Average—Security for Payment—Deposit.*] Where a general average loss has been incurred, the contributions to which cannot be immediately ascertained, a shipowner cannot reasonably insist, as a condition for the delivery of cargo, that the consignee should pay a deposit in such a manner that the shipowner has the control over it, and can draw on it for disbursements, or to discharge claims forming part of the general average and other expenses. HUTH *v.* LAMPORT - - - - - 442

5. —— *General Average—Security for Payment—Unreasonable Terms—Liverpool Bond.*] Where a shipowner in the exercise of his lien for general average requires security from the owner of the cargo liable to contribution without insisting upon immediate payment of the amount due, the security so required must be reasonable.—The defendants, who had a lien upon goods on board their ship for general average, did not demand payment of the amount due, but required as security that the consignees should make a deposit of 10 per cent. on the estimated value of the goods in the joint names of the defendants and their average adjuster, or in the names of the defendants, or in the name of the average adjuster, or should execute a bond providing that the deposit should be held as a security for the general average and particular charges, and that the parties in whose name it stood might pay thereout such sums as they should from time to time con-

SHIP—*continued.*

sider ought to be paid to the owners or master on account of money actually disbursed by them or him, or to enable them or him to pay off and discharge claims which formed part of the general average and other expenses. It also provided that all questions of general average should be referred to the average adjuster of the shipowner, subject to an appeal from the adjustment to arbitrators, whose decision should be final:—*Held*, by the Court of Appeal, affirming the judgment of the Queen's Bench Division, that the conditions of the deposit and the form of the bond were both unreasonable, and could not in the circumstances be imposed upon the consignees. HUTH *v.* LAMPORT - - - - C. A. 735

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2 & 3 Wm. 4, c. 45, s. 78 - - - 231
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3 & 4 Wm. 4, c. 22, ss. 10, 47 - - 754
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5 & 6 Wm. 4, c. 50, ss. 94, 95 - - 565
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3 & 4 Vict. c, 89 - - - - 7
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UNIVERSITY—*Oxford—Conusance of Action—Charter, Construction of—Jurisdiction of Chancellor's Court—Plaintiff resident out of City of Oxford.*] In an action for libels alleged to have been published in London, the defendant was a resident undergraduate member of Oxford University: the plaintiff resided in London and had no connection with the university. The Chancellor of the University having claimed conusance of the action in his Court under the Oxford Charter of 14 Hen. 8, confirmed by statute 13 Eliz.:—*Held*, that the privilege of the charter extended to cases in which the plaintiff resided outside the limits of the city of Oxford, and therefore that the claim must be allowed. GINNETT *v.* WHITTINGHAM - - - - 761
UNIVERSITIES—Oxford and Cambridge—Occupation of college rooms—Right to be registered as voter - - - 231 *See* PARLIAMENT. 6.

VENDOR AND PURCHASER—*Specific Performance—Rescission of Contract—Return of Deposit—Misleading Conditions of Sale—Restrictive Covenants—Sale of Estate of Lots—Purchaser for Value without Notice—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3.] The owner in fee of land sold and conveyed it, during the years 1865, 1866, and 1867, in thirteen lots to different purchasers, each lot being subject to covenants entered into by the purchasers, restricting the use of the land as a brickyard, and in other respects. The defendant subsequently became the purchaser of Lot 11, but the deed of conveyance to him did not contain the restrictive covenants. In 1882 the plaintiffs, a company for manufacturing bricks, contracted to purchase Lot 11 from the defendant under conditions of sale which stated that the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not; and provided that any error or omission in the particulars should not annul the sale, nor entitle the purchaser to compensation.—The existence of the restrictive covenants was not mentioned in the contract, but during the negotiations the defendant stated that there were covenants restricting the use of the land as a brickyard, but his solicitor, who was present, and to whom the plaintiffs' solicitor applied for information, stated that he was not aware of any such covenants. The plaintiffs paid a deposit upon the purchase-money, and having subsequently discovered that there were restrictive covenants, claimed to rescind their contract and sued the defendant to recover the amount of the deposit:—*Held*, affirming the decision of Wills, J., that the plaintiffs, if their contract with the defendant were carried out, would be bound by the restrictive covenants, and that the owners of the other twelve lots purchased from the original
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vendor would be entitled to enforce those covenants against the plaintiffs; that the plaintiffs were not precluded by the terms of the conditions of sale, nor by s. 3, sub-s. 3, of the Conveyancing Act, 1881, from refusing to complete the purchase, and that they were therefore entitled to recover the amount of the deposit. NOTTINGHAM PATENT BRICK AND TILE CO. *v.* BUTLER - C. A. 778
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WATERWORKS—*Proceedings for Recovery of Rates—Dispute as to Annual Value of Premises—Jurisdiction of Justices on Proceedings to enforce Rate—Waterworks Clauses Act*, 1847 (10 *Vict. c.* 17), *s.* 68.] Upon the hearing before justices of a summons to enforce payment of a water rate made under a local Act incorporating the Waterworks Clauses Act, 1847, the justices have power, under s. 68 of that Act, to determine a dispute as to the annual value of the premises rated. It is not necessary to their jurisdiction before making an order for payment of the rate upon such summons that the dispute should have been previously determined in a separate proceeding before justices.—*New River Company* v. *Mather* (Law Rep. 10 C. P. 442) distinguished. LEA *v.* ABERGAVENNY IMPROVEMENT COMMISSIONERS - - 18
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WILL—*Estate in Realty—Rule in Shelley's Case—Legal Estate—Equitable Estate—Devise to Trustees—Will made before the 1st of January*, 1838—*Quantity of Estate taken by Trustees—Discretionary Authority to sell—Tenant for Life with Power to appoint to Children—Ultimate Limitation to Right Heirs of Tenant for Life—"In default of such appointment"—Remainder—Executory Devise.*] By a will made in the year 1833 a testatrix devised a freehold messuage unto trustees, their heirs and assigns, upon trust for her daughter during her life, and after her decease upon trusts for the lawful child or children of the daughter as she should by deed or will appoint, and "in default of such appointment" in trust for her daughter's right heirs. The testatrix directed that the receipts of her daughter should be a discharge to the trustees, that the messuage should be enjoyed by her daughter free from the debts, control, or engagements of any husband with whom she might intermarry, and that the trustees might reimburse themselves. The tes-

WILL—*continued.*
tatrix authorized the trustees, their heirs or assigns, also to sell the messuage with the consent of her daughter "or other the persons or person who shall be beneficially interested under the trusts." The daughter after her mother's death granted the messuage to the defendants in fee simple, and died without having been married. The plaintiff, her heir-at-law, having brought an action to recover the messuage:—*Held*, that the messuage was devised to the trustees in fee simple at law; that the limitation to the right heirs of the daughter in default of an appointment to her children was a remainder and not an executory devise; that both the estate for life devised to the daughter and the remainder to her right heirs were equitable estates; that consequently the estate for life and the remainder to the right heirs coalesced pursuant to the rule in *Shelley's Case* (1 Rep. 93 b), that the daughter could make a valid disposition of the fee simple, and that the defendants were entitled to the messuage. By Cotton, L.J., *Cunliffe* v. *Brancker* (3 Ch. D. 393) and *In re Hart's Estate* (W. N. 1883, p. 164) distinguished. A power given by will to a tenant for life to appoint to his children, with an express limitation over "in default of such appointment," cannot be construed as conferring upon the children any estate or interest in default of the exercise of the power of appointment, at least in the absence of provisions extending the operation of the power. By Lord Esher, M.R., *In re Jeffery's Trusts* (Law Rep. 14 Eq. 136) dissented

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from as to this point. By Cotton, L.J., *Bradley* v. *Cartwright* (Law Rep. 2 C. P. 511) explained and distinguished. Richardson *v.* Harrison [C. A. 85

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